80-313

DOCKET NO.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES SUTTON,

Appellant,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

AND

ON APPEAL FROM THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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August 26, 1980

Questions Presented [1].

1. Is Rule 691.4 of the Rules of the Appellate Division, Second Department, New York Supreme Court, 22A NYCRR 691.4 unconstitutional as applied under the Due Process and Equal Protection Clauses of the 14th Amendment, which as applied denied appellant notice of the charges and opportunity to be heard in the adjudicatory first stage of the statutory two stage public, quasi-criminal attorney disciplinary proceedings conducted by the respondent in secret?

(a) Is Rule 691.4(e)(5) of the said Rules, 22A NYCRR 691.4(e)(5) unconstitutional on its face and as applied under the Due Process and Equal Protection Clauses of the 14th Amendment for vagueness and for the same reasons as aforesaid?

2. Is it unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amendment in an attorney

1. Note at p.iii.

disciplinary proceeding to try, convict and punish appellant attorney by suspension from the practice of law and by stigmatization, based only on a 'preponderance of the evidence' standard of proof?

(a) What is the constitutionally sufficient standard of proof in this case?

3. Was the appellant denied due process of law under the 14th Amendment by the insufficiency of the evidence to support conviction as to (a) Santora and (b) Zolondek charges, respectively?

4. In view of the fact that the appellant was not charged with "misrepresentation" in the Zolondek negligence case, was appellant denied due process of law under the 14th Amendment by his conviction that he misrepresented that the case was on the trial calendar, as to which he had no notice or opportunity to be heard?

1.
Note to : "Questions Presented" :

The first question presented is properly presented by appeal and the second, third,and fourth questions are therefore properly included in the jurisdictional statement. Prudential Insurance Co. v. Cheek, 259 U.S. 530, 547 (1922).

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Opinions below

The slip decision opinion of the New York Court of Appeals dated February 7, 1980 is set forth at App. 22 a, and is reported officially in 49 N.Y. 2d 799,and unofficially in 426 N.Y.S. 2d cxxxiv. The slip decision opinion of the New York Court of Appeals dated April 1, 1980 is reported officially in 49 N.Y. 2d 706 (App. 23 a) and unofficially in 426 N.Y.S. 2d_____ (App. 23 a). The slip decision opinion of the New York Court of Appeals dated May 29, 1980 is not reported (App. 24 a). The opinion of the Appellate Division, Second Department, New York Supreme Court, dated November 13, 1979 is set forth at App. 17 a, and is reported officially in 70 A.D. 2d 467, and unofficially in 421 N.Y.S. 2d 371. The opinion of the said Appellate Division dated January 2, 1980 is not reported (App. 20 a). The report dated May 11, 1980 of the referee to hear and report is not reported and is set forth at App. 2 a.

Jurisdiction

In an attorney disciplinary proceeding, appellant Charles Sutton appeals from the order of the Appellate Division, Second Department of the New York Supreme Court dated and entered November 13, 1979 suspending him from the practice of law for a period of three years, denying his motions challenging the constitutionality of Rule 691.4, impermissibility of the preponderance of evidence standard of proof, insufficiency of evidence, and conviction of a charge not made, under the Fourteenth Amendment. He also appeals from the order of the New York Court of Appeals dated and entered February 7, 1980 which dismissed his appeal taken as of right, from the order of that Court of Appeals dated and entered April 1, 1980, denying reargument and denying leave to appeal, and from its order dated and entered May 29, 1980 denying reargument of the appellant's motion for leave to ap-

peal on those constitutional grounds.

The Notice of Appeal dated August 13, 1980 to the Appellate Division was filed in that Court August 18, 1980. The Notice of Appeal dated August 13, 1980 to the New York Court of Appeals was filed in that Court on August 18, 1980. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1257(2).

Constitutional Provisions and Statutes Involved

United States Constitution:

Fourteenth Amendment:

Due Process and Equal Protection Clauses

Statutes and Rules:

28 U.S.C. Section 1257(2);
New York Judiciary Law, Section 90(2);
Rules of the New York Supreme Court,
Appellate Division, Second Department:
Rule 691.1, 22A NYCRR 691.1
Rule 691.2, 22A NYCRR 691.2
Rule 691.4, 22A NYCRR 691.4

Code of Professional Responsibility:
DR 9-102(A)
DR 6-101(A)(3)
DR 7-101(B)(1)

The texts of the foregoing are set out in the Appendix at pp. 47a-65a.

Statement of the Case

This is an attorney disciplinary proceeding. The appellant Charles Sutton is a 55 year old attorney, admitted to practice in 1952, active in both civil and criminal cases, at trial and on appeal. The Appellate Division in its opinion dated November 13, 1980, stated that the appellant Charles Sutton had an "unblemished record,... (and) excellent character references attesting to his trustworthiness." (App. 19a). The appellant Charles Sutton is married to his wife Rachel for 29 years; they have two sons, Morris, age 23, a second year law student at Cardozo School of Law, and David, 21, a student at Columbia University.

Rule 691.4 of the Rules of the Appel-

late Division, Second Department, 22A NYCRRA 691.4,[1] provides that attorney disciplinary proceedings are conducted in two separate adversarial, adjudicatory stages, the first in and before the respondent grievance committee, and the second in the Appellate Division. (53a-61a). Respondent unconstitutionally applied 691.4 in violation of the due process and equal protection clauses of the 14th Amendment to deny appellant notice of the charges and opportunity to be heard, conducted the first stage proceedings in secret, adjudicated him guilty of misconduct by secret report dated March 22, 1977 which it filed with the Appellate Division in a secret, ex parte motion for an order from that court authorizing the commencement of the more serious and higher jeopardy second stage proceedings in the Appellate Division, which was granted; that order dated April 25, 1977 was also secret. The second stage proceedings by respondent com-

menced on November 1, 1977 by service of the charges. Appellant challenged the constitutionality of Rule 691.4 as applied under the Due Process and Equal Protection Clauses of the 14th Amendment by notice of motion to the Appellate Division dated June 2, 1978, prior to the commencement of the second stage trial; also,after trial, on the motion to Appellate Division dated June 5, 1979 to disaffirm the referee's report; on the motion for reargument and for leave to appeal to the New York Court of Appeals dated December 14, 1979, in appellant's notice of appeal taken as of right dated December 10, 1979, in the amended notice of appeal dated December 20, 1979, in the further amended notice of appeal dated January 10,1980, in the Jurisdictional Statement dated December 20, 1979 to the New York Court of Appeals, in appellant's motion dated January 10, 1980 to the New York Court of

Appeals for a stay pending appeal and in opposition to respondent's motion to dismiss the appeal taken as of right, in appellant's memorandum of law filed in the New York Court of Appeals in January, 1980, in appellant's motion dated February 17, 1980 to the New York Court of Appeals to reargue and for leave to appeal, and in appellant's memoranda of law dated February 25, 1980 and March 7, 1980 to the New York Court of Appeals. The Appellate Division denied the motions. (1a, 17a, 20a). The New York Court of Appeals held that "no substantial constitutional question was directly involved" (22a) and denied the motions (22a, 23a, 24a). Appellant challenged the constitutionality of Rule 691.4 (e)(5) on its face in his Notice of Appeal dated December 10, 1979 to the New York Court of Appeals, in the amended notice of appeal dated December 20, 1979, in the further amended notice of appeal dated

January 10, 1980, in the Jurisdictional Statement to the New York Court of Appeals dated December 20, 1979, and on the motion dated February 17, 1980 to the New York Court of Appeals to reargue and for leave to appeal, in the memorandum of law dated February 25, 1980 filed therewith, Point XII, pp. 57-59. In this attorney disciplinary proceeding the issues of fact and of credibility were decided by a "fair preponderance of the evidence" on the stated premise that this is a civil proceeding. The referee ruled:

> "It should be remembered that this is a civil proceeding and the petitioner need only prove the charges by a fair preponderance of the evidence. Feola v. N.Y.S. Bar Association, 37 App.Div. (2) 789". (App. 9a).

The appellant raised the constitutional issue of the proper standard of proof in his memorandum of law to the referee dated March 19, 1979, that the standard must be "clear and free from doubt", also citing Matter

of Ruffalo, 390 U.S. 544 (1968), in his memorandum of law dated June 5, 1979 to the Appellate Division on the motion dated June 5, 1979, in the appellant's motion dated December 14, 1979 to the Appellate Division to reargue and for leave to appeal to the New York Court of Appeals citing Addington v. Texas, 99 S. Ct. 1804 (1979), on appellant's motion to reargue and for leave to appeal to the New York Court of Appeals dated June 5, 1979, in the notice of appeal as of right dated December 10, 1979 to the New York Court of Appeals, in the amended notice of appeal dated December 20, 1979, in the further amended notice of appeal dated January 10, 1980, in the Jurisdictional Statement to the New York Court of Appeals dated December 20, 1979, in the motion to the New York Court of Appeals for a stay pending appeal and in opposition to respondent's motion to dismiss the appeal

taken as of right dated January 10, 1980, in the memorandum of law submitted therewith, in the motion to reargue and for leave to appeal to the New York Court of Appeals dated February 17, 1980, in the memoranda of law dated February 25, 1980, February 28, 1980 and March 7, 1980, and in the motion to reargue leave to appeal to the New York Court of Appeals dated April 30, 1980. The Appellate Division and the Court of Appeals denied the motions; the Court of Appeals held that "no substantial constitutional question is directly involved" (App. 22a).

Santora

Appellant owned a two family house which he contracted to sell to Rocco Santora and Mary Santora through Plover Builders,Inc., a corporation of which appellant was sole stockholder, officer and director (T285, 309-310, 311, 312,361, 259,292) on June 25, 1971 for $25,500.00,

with a $1,500.00 down payment. The purchasers were at all times represented by their own attorneys; appellant never offered them any legal advice (T14-17, 19, 158-159, 86, 87, 89). At the contract signing, appellant orally agreed to accept a check made by Rocco Santora for the down payment marked in escrow (T262, 21).[2] There was no written escrow agreement. Appellant placed the check in his file, and never endorsed and never deposited it (T286). Three days later, on June 28, 1971, Korobow, purchasers' attorney, telephoned appellant, asked him for permission for the Santoras to take possession of the contract property prior to payment of the balance of the purchase price (T266-270, 290-291, 338-339). Appellant agreed on condition that the purchasers pay the contract down payment free of escrow (T266-270, 290-291, 338-339, 343-344). Korobow agreed and told appellant he would so arrange it and did (T266-270, 290-291,304,

338-339). The contract down payment was paid free of escrow (66a-67a); (T70, 57); the escrow check was simultaneously returned to the purchasers (T269-270). The purchasers took possession (T266-268, 290-291, 338-339, 343-344) and put on their own lock and did not give a key to appellant (T131, 227-230) and threw out the furniture and other property in the building (T128-129). It is important to note that the Santoras did not claim and offered no proof that the contract down payment when made was their money, which belonged to them. As a matter of law, the contract down payment when made belonged to the seller.[3] On September 24, 1971 (72a), the purchasers anticipatorily breached the contract by their letter refusing to 'go further' with the contract because of 'difficulties' with the property. Appellant had made an error: he had trusted the adversary attorney and had taken his word, instead of requiring a letter from

him authorizing appellant to receive the contract down payment from the purchaser free of escrow. Korobow testified that he did not "know" of the "substitution of checks" until two years later on January 17, 1973; on the other hand he testified that between June 25 and June 28 1971, his clients had asked him to get the said permission (T162, 204). In the civil action by appellant, on assignment of the cause of action from Plover Builders, Inc. against the purchasers to recover damages for their breach of contract, Korobow filed an affidavit sworn to April 12, 1978 averring that it was true that at no time was appellant paid and at no time did appellant receive a single cent in escrow.[4] On cross-examination Korobow did not deny that he had telephoned appellant on June 28, 1978 for permission for his clients to take immediate possession of the contract property; he testified that he did not

remember (T487-489, 561-562, 538) (App. that he could not recollect because it was "seven years ago" (T198). On September 29, 1973 (T370) he testified he could not remember if he had remembered on this issue on his prior testimony on July 19, 1978 in this very trial (T487-488). The record shows numerous instances when Korobow testified "I don't remember" and thus avoided cross-examination (T197-202, 219, 462, 481-482, 484, 487, 488-491, 496, 530-534,535, 543-546).[5]

As to the referee's conclusion that he "believed Korobow" that prior to the signing of the contract appellant "agreed" to obtain the bank mortgage for the purchasers (12a-13a) whereas the contract explicitly states that the purchasers at their own cost and expense must obtain their own mortgage commitment; the contract was drafted and prepared by Korobow, at Korobow's office, using Korobow's contract forms, and mortgage rider provisions

(T499-501, 167-169). Purchaser Mary Santora testified that the purchasers had applied to a bank for a mortgage (T47). Purchaser Rocco Santora testified that his attorney and the broker were to get the mortgage (T26). Real estate salesperson Norma Mathes was not present on June 25, 1971 and had no knowledge (T384). Real estate broker Olita did not remember anything about the transaction (T389).

The critical issue in this case was the issue of credibility between Korobow and appellant. The respondent (T 536-537, 517) and the referee (T 537) acknowledged that fact.[6] The constitutionally proper standard of proof is a critical component of a fair trial and of the truth finding function thereof, and directly affects the outcome in this case.

Zolondek

The respondent made this charge in the second stage proceedings by its petition dated November 1, 1977 over 20 years after the accident and over 12 years after the case was dismissed. This was a minor negligence case in which Mrs. Zolondek's five year old son fell while she helped him off a hobby horse.
The referee found that the case lacked merit (15a). The accident allegedly occurred on April 19, 1959. After two years of requests for a medical report, Mrs. Zolondek finally in 1979 brought in a medical report without any medical bill and without dates of treatment. The doctor who furnished the medical report died in 1959. A summons and complaint were served; the boy was examined by an insurance company doctor and the case was placed on the trial calendar. In 1964 a trial preference was denied (T572). The insurance company denied liability and would

not pay anything. Appellant told Mrs. Zolondek that all his efforts to settle the case were fruitless; that the case could not be tried (T 595, 568). She left it entirely to appellant to do what he thought best (T568). The case came up on the trial calendar and was marked off and later dismissed (T598, 595, 596). [7]

Appellant was convicted by the referee of "neglecting" this non-meritorious case, to the 'prejudice of the court'. [8]

The referee convicted appellant of a charge not made, namely, "misrepresenting" to Mrs. Zolondek "in 1972" that the case was on the trial calendar (App. 15a).

This case also was decided on an issue of credibility. The issue that appellant was denied due process under the 14th Amendment by conviction on a charge not made, and without notice and opportunity to be heard, citing In re Ruffalo, 390 U.S. 544 (1968) was made to

the Appellate Division:by motion dated June 5, 1979 and by memorandum of law dated June 5, 1979 at Point IV, page 47 and Point VII-E, pp.59-60; by motion to reargue and leave to appeal to the New York Court of Appeals dated December 14, 1979; by notice of appeal dated December 10, 1979 to New York Court of Appeals taken as of right, by amended notice of appeal dated December 20, 1979, by further amended notice of appeal dated January 20, 1980; and to the New York Court of Appeals : by motion for a stay pending appeal and in opposition to motion to dismiss appeal taken as of right dated January 10, 1980 and memorandum of law filed therewith January, 1980, Point VII,pp. 60-62; on motion dated February 17, 1980 for reargument and leave to appeal and memorandum of law dated February 25, 1980 Point V,pp.24-32. The Appellate Division convicted appellant (17a-20a), denied his motion for reargument (35a).

The New York Court of Appeals held that "no substantial constitutional question was directly involved"(22a), and denied each motion.(38a,39a,41a).

The issue of the insufficiency of the evidence in violation of the Due Process Clause of the Fourteenth Amendment was raised in the notice of appeal to the New York Court of Appeals dated December 10, 1979, December 20, 1979 and January 10, 1980, respectively and in the New York Court of Appeals on the appellant's motion dated February 17, 1980 to reargue the motion dismissing the appeal taken as of right and for leave to appeal, and by memorandum of law dated February 25, 1980 at Point VI,pp. 33-36. Conviction without evidence is fundamentally unfair and violates the clear and repeated decisions of this Court as set forth below, Point IV, and absent review in this Court may not be reviewable in any other court.(See, Mildner v. Gulotta, 405 F.Supp. 182, 191(EDNY,3 Judge Court,1975),aff'd, 425 U.S. 901 (1976).

Footnotes to Statement of the Case

1. These rules of court, which were promulgated under N.Y. Jud. Law, Section 90(2), Person v. Assoc. of the Bar of the City of New York, 554 F. 2d 538 (2d Cir. 1977), have the force and effect of Statutes. Matter of Moore, 108 N.Y.282 (1888).

2. Appellant was not a party or signatory ,either personally or as attorney, to the contract, which was not an escrow agreement, and he was not subject to it. Dember Constr. Corp. v. Staten Island Mall, 56 A.D. 2d 768 , 392 N.Y.S. 2d 299 (1st Dept. 1977); La Potin v. Julius Lane Co., 30 A.D. 2d 527 (1st Dept. 1968); Farago v. Burke, 262 N.Y. 229 (1933).

3. Lawrence v. Miller, 86 N.Y. 131, 139-140 (1881). There cannot be any "conversion" where the money is not the property of the Santoras. McCoy v. American Express Co., 253 N.Y. 477 (1930).

4. "Plaintiff (appellant) tries to obfuscate the real issue in this case by

saying at paragraph 17 of his affidavit in support hereof, inter alia, 'at no time was I paid and at no time did I receive a single cent in escrow of the money paid on account of the contract down payment.' That is literally true..." Affidavit of Marvin E. Korobow sworn to April 12, 1978 quoted in the affidavit of Charles Sutton dated June 16, 1978, page 8, par. 29, on appellant's motion to the Appellate Division, supra.

5. Wigmore, Evidence, Section 995 (Chadbourne Ed. 1940) page 931, states:

> "Repeated instances of inability to recollect gives the right to doubt the correctness of an alleged recollection of a material fact; the force of the instances depending on the greater or lesser probability that one thing could be forgotten while the other thing is remembered..." Also, People v. Fitzpatrick, 40 N.Y. 2d 44, 386 N.Y. 2d 28, 32, 52, 351 N.E. 2d 675 (1976) that the testimony of a witness that he does not recall does "not contradict or disprove any testimony or other factual evidence..."

6. T537: The Referee: "It's for me to determine who's telling the truth." The respondent's attorney: "That's the issue".

7. DR 7-101(B)(1) permits an attorney to exercise his judgment not to prosecute a case. This court, in Ohralik v.Ohio, _____U.S._____, 98 S. Ct. 1912, 1919 (1978) at note 19 warned attorneys that a claim with little merit should not be pressed beyond the point of reason. In Reilly v.Millcourt Realty Corp. and Kramer,Dilloff,etc., 71 A.D. 2d 884 (2d Dept. 1979) that court complimented that noted law firm for not prosecuting a case.

8. Since the case lacked merit, as a matter of law no prejudice could result. N.A. Kerson Co. Inc. v. Shayne Dachs, etc.,45 N.Y. 2d 730 (1978); Parksville Mobile Modular,Inc. v. Fabricant, ____A.D. 2d____, 422 N.Y.S. 2d 710, 716-717(2d Dept.1979); Joint Bar Assoc. Gr. Comm. v. Sandalls , ____A.D. 2d____,421 N.Y.S.2d 890(2d Dept.1979); Schmitt v.McMilla 175 App.Div. 799, 162 N.Y.S.437 (1st Dept.191 Garguilo v. Schunk, 58 A.D. 2d 683,395 N.Y.S. 2d 751 (3rd Dept. 1979); St. John v. Tepper, 54 A.D. 2d 712 (2d Dept. 1976).

The Questions Are Substantial

Point I

Rule 691.4 as applied is unconstitutional under the 14th Amendment.

Whether Rule 691.4 is unconstitutional as applied which denied appellant notice and opportunity to be heard in the first stage of the statutory two-stage judicial, accusatory and adjudicatory highly penal, adversary, quasi-criminal attorney disciplinary proceedings at which respondent adjudicated appellant to be guilty of misconduct prima facie by ex parte secret proceedings, and recommended the commencement of the serious second stage proceedings which subjected appellant to suspension or disbarment, is a substantial constitutional question in light of the precious and transcending nature of appellant's fundamental interests at stake of "liberty" and "property", which are as "dear as life itself", to practice his profession of law, which he

has spent a lifetime of study, effort and devotion to create and develop, to earn a livelihood, to support his family, and not to be stigmatized in his good name and reputation, among his colleagues, other attorneys, judges, clients, family, friends, neighbors, and the community by conviction of misconduct by the respondent without notice and opportunity to be heard at secret, ex parte proceedings, in the face of the plain words of the rule requiring notice and opportunity to be heard to be given to appellant and which is accorded to every other attorney, except appellant, and in the face of the fact that the respondent was created for the very purpose to conduct the first stage disciplinary proceedings as adversary proceedings, and that for over 60 years prior to Rule 691.4, that was the purpose and function of a Grievance Committee, and in the light that Rule 691.4

as applied, conflicts with the decisions of this Court enforced in times of peace and war, and challenges and flies in the face of, the most fundamental principle of our Constitution, to give notice and opportunity to be heard to every person subjected to adjudication of misconduct or grievous loss involving or impinging upon his fundamental right of "liberty" or "property", as a matter of due process. Absent review in this Court, appellant may have no review in any other court. (See Mildner v. Gulotta, 405 F. Supp. 182,191 (E.D.N.Y.3 Judge Court,1975),affd.425 U.S. 901(1976)). Rule 691.4 and Rule 691.4(e)(5) as applied by respondent to deny appellant the right to notice and opportunity to be heard in and before the Committee at the first stage of the statutory two-stage attorney disciplinary proceedings,each of which is an accusatory and adjudicatory proceeding,at which respondent convicted appellant of misconduct in secret ex parte first stage proceedings in and before respondent and then made a secret motion to the

Appellate Division to obtain a secret order adjudicating misconduct by the attorney and directing commencement of the more serious and higher penalty second stage disciplinary proceeding, which that court granted by its secret order dated April 25, 1977, is unconstitutional under the Due Process Clause of the 14th Amendment. Jenkins v. McKeithen, 395 U.S. 411, 428-430 (1969); Hannah v. Larche, 363 U.S. 420, 442 (1960); Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170-173 (1951)(Frankfurter, J., concurring); Greene v. McElroy, 360 U.S. 474, 496-497 (1969); In re Oliver, 333 U.S. 257, 273 (1948); In re Taylor, 567 F. 2d 1183, 1187-1188 (2d Cir. 1977).

The interests at stake of appellant Charles Sutton are his fundamental Constitutional rights of "liberty" and "property", Greene v. McElroy, 360 U.S. 474 (1959); In re Ruffalo, 390 U.S. 544 (1968); Spevak v. Klein, 385 U.S. 511 (1967); Goss v. Lopez,

419 U.S. 565, 95 S. Ct. 729, 736-737 (1975); Board of Education v. Roth, 408 U.S. 564, 571-572, also note 2 (1972); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Barsky v. Board of Regents of New York, 347 U.S. 442, 471, 98 L. Ed. 829, 849, 74 S. Ct. 650 (1954)(Justice Frankfurter, dissent); Ex Parte Wall, 107 U.S. 265, 289 (1882); Paul v. Davis, 424 U.S. 693, 710-711, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976), which are involved and impinged upon by what the respondent has done and is doing to him.

> "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. Dent v. West Virginia, 129 U.S. 114, 32 L. Ed. 2d 623, 9 S.Ct. 231; Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752, 64 A.L.R. 2d 288; Peters v. Hobby, 349 U.S. 331, 352, 99 L. Ed. 1129, 1144, 75 S. Ct. 790, (concurring opinion);... Truax v. Raich, 239 U.S. 33, 41, 60 L. Ed. 131, 135, 36 S. Ct. 7..." Greene v. McElroy, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959).

> "...(A)n attorney's calling or profession is his property, within the true sense and meaning of the Constitution..." Ex parte Wall, 107 U.S. 265, 289 (1882).

These interests are of "transcending value", Speiser v. Randall, 357 U.S. 513, 525-526 (1959); they are "as dear as life itself". People ex rel Chicago Bar Assoc. v. Bither, 334 Ill. 264, 165 N.E. 798, 804 (1929).

Attorney disciplinary proceedings are "adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U.S. 1, 33, 18 L. Ed. 2d 527, 549, 87 S. Ct. 1428. ... Disbarment, designed to protect the public is a punishment or penalty imposed on the lawyer, Ex parte Garland, 4 Wall. 333, 380, 18 L. Ed. 366, 369; Spevak v. Klein, 385 U.S. 511, 515, 17 L. Ed. 2d 574, 577, 87 S. Ct. 625. He is accordingly entitled to due process of law." In re Ruffalo, 390 U.S. 544, 550-551 (1968); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 731, 27 L. Ed. 2d 749 (1971); (Black, Douglas, JJ, dissent); Spevak v. Klein, 385 U.S. 511, 17 L. Ed. 2d 574, 578 (1967); Erdmann v. Stevens, 458 F. 2d 1205, 1209-1210 (2d Cir.), cert. den.409

U.S. 889 (1972); Matter of an Attorney, 83 N.Y. 164, 165 (1880); Matter of Kelly, 59 N.Y. 595, 596 (1874).

The respondent is a quasi-judicial body acting in and as a part of a judicial proceeding and was created by the Appellate Division, pursuant to New York Judiciary Law Section 90(2), Person v. Assoc. of the Bar of the City of New York, 554 F. 2d 534, 538 (2d Cir. 1977) for the very purpose of conducting the first stage of the statutory two-stage attorney disciplinary proceedings charges of misconduct against appellant and other attorneys similarly situated. Rule 691.4 ; Weiner v. Weintraub, 22 N.Y. 2d 330, 331-332 (1968); In re Branch, 178 App. Div. 585, 165 N.Y.S. 2d 690 (1st Dept. 1917). In Weiner v. Weintraub, supra, the New York Court of Appeals stated as to the Grievance Committee: "... it is their function to determine whether or not the charges are supportable."

The State's own interest therefore is

to provide the attorney with notice of the specific charges and with an opportunity to be heard in and before the respondent in the first instance. Rule 691.4; Weiner v. Weintraub, supra; In re Branch, supra.

The critical importance of the right to notice and opportunity to be heard in the first stage proceedings before the respondent, additionally, is that the respondent is composed of attorneys who see and hear the witnesses and who have the power to adjudicate the charges by dismissal, or some penalty less than suspension or disbarment (Rule 691.4(e)(1-3),f-i)(57a-61a), whereas, at the second stage disciplinary proceeding in the Appellate Division, that court appoints a referee to hear and report, who has no power to dismiss the charges, In re O'Neill, 184 App.Div. 75,80(1stDept.1918) and the case is actually decided by the Appellate Division on the cold record, without even oral argument and without findings of fact and conclusions of law being ex-

pressed, which is particularly serious when the issue of one of credibility between adversary attorneys, as in this case Mildner v. Gulotta, 405 F. Supp. 182,212-215(dissent, Weinstein,J.)(EDNY,1975)affd.425 US 901(1976).

At the second stage proceedings the appellant is a person already convicted of misconduct by the respondent in the first stage proceedings. The second stage proceedings are not de novo proceedings conducted on a clean date. The appellant enters the second stage proceedings burdened with the adjudication of misconduct made by the respondent at the first stage of that two stage proceedings. The second stage proceeding is not possible absent adjudication of misconduct in the first stage Rule 691.4(e)(4). It is no answer therefore to the denial of notice and opportunity to be heard at the first stage judicial proceedings in and before the respondent that the appellant was later given notice and opportunity to be heard in the

more serious second stage judicial attorney disciplinary proceedings in the Appellate Division. Gonzales v. United States, 348 U.S. 407, 416-417 (1955); Simmons v.United States, 348 U.S. 397 (1955); Chicago etc. R. Co. v. Minnesota, 134 U.S. 418, 457(1889); Southern R. Co. v. Virginia, 290 U.S. 190, 195-199 (1933).

Notice of the specific charges and opportunity to be heard thereon in an adversarial judicial proceeding in and before the respondent at the first stage judicial disciplinary proceeding and compliance by the respondent with all of the requirements of Rule 691.4(e)(1-4), (f), (g) and (h) are specific statutory "preconditions to adverse official action", Vitek v. Jones, _____U.S. _____, 63 L. Ed. 2d 552, 563, 100 S. Ct. 1254 (1980) which the appellant properly relied upon, and with which the respondent failed to comply by reason of its unconstitutional application of Rule 691.4.

In Barsky v. Board of Regents, 347 U.S. 442, 470-471 (1954), Justice Frankfurter in his dissent stated:

> "If a state licensing agency lays bare its arbitrary action, or if the state law explicitly allows it to act arbitrarily, that is precisely the kind of state action which the Due Process Clause forbids. See Perkins v. Ely, 307 U.S. 325, 349, 350, 83 L.Ed. 1320, 1333, 1334, 59 S. Ct. 884; ...The limitation against arbitrary action restricts the power of the State, 'no matter by what organ it acts.' Morgan v. Dockery, 191 U.S. 165, 171, 48 L. Ed. 133, 134, 24 S. Ct. 53, 63 LRA 571."

In the case at bar, the arbitrary action of the respondent in its application of Rule 691.4 is laid bare by the record.

Since Rule 691.4(e)(1-4),(f), (g),(h) and (i) expressly provides for and requires notice of the specific charges and opportunity in each of the two, two-stage proceedings, Rule 691.4 is unconstitutional, as applied, in violation of the Due Process Clause of the 14th Amendment to deny appellant those rights. Wolff v. McDonnell, 418 U.S. 539, 557 (1974): United States v. Nixon, 418 U.S. 683, 694-696 (1974): Accardi v.

Shaughnessy, 347 U.S. 260, 268 (1954); Service v. Dulles, 354 U.S. 363 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959); Yellin v. United States, 374 U.S. 109 (1963); Bridges v. Wixon, 326 U.S. 135, 152 (1945); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Morrissey v. Brewer, 408 U.S. 471 (1972); Scarpelli v. Gagnon, 411 U.S. 778 (1973); Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 402 (2d Cir. 1977); United States v. Leahy, 434 F.2d 7, 8, 10 (1st Cir. 1970).

Rule 691.4(e)(5) should have been applied and construed

> "so as to observe due process in its basic meaning. See, e.g. Anniston Mfg. Co. v. Davis, 301 U.S. 337; American Power Co. v. S.E.C., 329 U.S. 90, 107-108; Wong Yang Sung v. McGrath, 339 U.S. 33, 49." Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring).

Historically, even prior to the promulgation of Rule 691.4 by the Appellate Division in November 1974, it has been the settled practice in the State of New York, in particular, the First and Second Depart-

ments, for more than 60 years, for the two-stage disciplinary proceedings, to accord to the attorney subjected to any charges, notice of the specific charges, and a hearing before the Grievance Committee, in the first instance, in substantially similar procedure as set forth in Rule 691.4, and thereafter only after the Grievance Committee has made its adjudication, may there be a second stage proceeding in the Appellate Division. In the Matter of Anonymous No. 1, an attorney v. Shernov, 13 N.Y. 2d 654, 240 N.Y.S. 2d 769 (1963); In re Goodman, 199 N.Y. 143, 144 (1910); Weiner v. Weintraub, 22 N.Y. 2d 330, 331-332 (1968); In the Matter of Anonymous, an attorney, 10 A.D. 2d 666, 196 N.Y.S. 2d 125 (1st Dept. 1960); In re Tuck, 180 App. Div. 924 (1st Dept. 1917); In re Branch, 178 App. Div. 585 (1st Dept. 1917); In re Zaslav, 21 A.D. 2d 243 (1st Dept. 1964); see also, Committee on Grievances v. Strickland, 200 N.C. 630, 158 S.E. 110,112 (1931).

"The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and an opportunity to meet it'. Joint Anti-Fascist Comm. v. McGrath, 341 U.S. at 171-172, 95 L. Ed. 2d 817, 71 S. Ct. 624 (Frankfurter, J. concurring)." Mathews v. Eldridge, 424 U.S. 319, 348-349, 47 L. Ed. 2d 28, 41, 96 S. Ct. 893 (1976).

"No conflict exists between constitutional requirements and exaction of the highest moral standards from those who would practice law. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 239, 1 L. Ed. 2d 796, 801, 77 S. Ct. 752, 64 A.L.R. 2d 288. Certainly lawyers and courts should be particularly sensitive of, and have special obligation to respect, the demands of due process." Willner v. Committee on Character and Fitness, 373 U.S.96, 106 (1963), (Goldberg, J. concurring).

Point IA

Rule 691.4(e)(5) is void for vagueness under the Fourteenth Amendment

Rule 691.4(e)(5) is unconstitutional on its face and as applied in violation of the Due Process Clause of the 14th Amendment for vagueness. Connelly v. General Construction Co., 269 U.S. 385 (1926); Cramp v. Board of Education, 368 U.S. 278 (1961); Champlin Refining Co. v. Corporation Comm., 286 U.S. 210, 243 (1932); Lar-

gent v. Texas, 318 U.S. 418 (1943); Gelling v. Texas, 343 U.S. 960 (1952); Coates v. Cincinnati, 402 U.S. 611 (1971); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Ashton v. Kentucky, 384 U.S. 195, 199-200 (1966); Smith v. Goguen, 415 U.S. 566, 571-573 (1974); International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

> "The due process doctrine of vagueness... requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'. E.G. Grayned v.City of Rockford, 408 U.S. 104, 108-109,33 L. Ed. 2d 222, 92 S.Ct. 2294 (1972). See, Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L. Rev. 67 (1960)." Smith v. Goguen, 415 U.S. 566, 571-573 (1974).

This constitutional issue was raised in appellant's Notice of Appeal dated December 10, 1979, the Amended Notice of Appeal dated December 20, 1979, the Further Amended Notice of Appeal dated January 10, 1980, the Jurisdictional Statement to the New York Court of Appeals dated December 20, 1979, the appellant's memorandum of law dated Feb-

ruary 25, 1980 in support of his motion for leave to appeal to the New York Court of Appeals, Point XII, pp. 57-59.

In Connelly v. General Constr. Co., supra, the vagueness of the statute was the uncertainty as to the statutory meaning of the word "locality" as to its application to current rate of wages. In Largent v. Texas, supra, the statute was held unconstitutional on its face and as applied for vagueness which provided: "if after investigation the mayor deems it proper or advisable he may issue a written permit..." In Gelling v.Texas, supra, the ordinance authorized "a local Board of Censors to deny a license for a showing of a motion picture which the Board is 'of the opinion' is 'of such character as to be prejudicial to the best interests of the people of the said City'... This ordinance offends the due process clause of the 14th Amendment on the scope of indefiniteness". (Concurring opinion by Justice Frankfurter, 343 U.S. 960 (1952). In Ashton v. Kentucky, 384 U.S. 195,

199 (1966) the Supreme Court stated:

> "In Terminiello v. Chicago, 337 U.S. 1, 93 L.Ed. 1131, 69 S.Ct. 894, we held unconstitutional an ordinance which as construed punished an utterance as a breach of the peace 'if it stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance. Id. at 3, 93 L. Ed. at 1134..."

Rule 691.4(e)(5) does not set forth any definition or standard of any kind whereby the respondent or anyone else can determine, upon any reasoned, principled, or rational basis, which attorney, as distinguished from any other attorneys similarly situated, should be denied the substantive and procedural rights of the first stage judicial proceedings in and before the respondent set forth in Rule 691.4(e)(1-4),(f),(g),(h) and (i). There is simply no basis in Rule 691.4(e)(5) for any objectivity or evenhandedness in any decision of the respondent to deny to one attorney, as distinguished from any other attorney similarly situated, those critical rights. There is nothing in Rule 691.4, or

in Part 691, as a whole, which gives "meaning and content to the words 'public interest'." NAACP v. Federal Power Comm., 425 U.S. 662 (1976); see also, Goldberg v. Barger, 37 C.A. 3rd 987, 996 (1974). State v. North Dakota Hospital Service Ass'n., 106 N.W. 2d 545, 547 (1960); Russell v. Wheeler, 439 P. 2d 43, 46 (1968); Dockery v. Dockery, 559 S.W. 2d 952, 955 (1977); also, Delancy v. Penza, 148 N.J. Super. 64, 371 A. 2d 830(1977).

In this case, there is simply no "public interest" involved whatever those words mean in Rule 691.4(e)(5). What does "prompt action" mean? The Santora matter was more than 6 years old as of the date of the respondent's petition dated November 1, 1977, and was not decided until 2 years after that, a total of more than 8 years. As to the Zolondek matter, the accident occurred in April, 1957, more than 20 years prior to the date of the petition. It was placed on the trial calendar in 1964; it was stricken from the trial calendar in 1965, a period of more than

12 years prior to the date of the petition. As to De Loach which the Referee dismissed, that case was a minor automobile accident case which occurred in 1963, a period of 14 years, until the date of the petition.

If there was concern by respondent for "prompt action", whatever that may mean in the context of Rule 691.4(e)(5) then the way to have solved that concern would have been to have proceeded quickly to comply with those rules, and to accord to the appellant the Constitutional and statutory rights set forth by Rule 691.4. Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231, 237 (1960). Instead of doing that, the respondent unconstitutionally applied Rule 691.4 as aforesaid.

This Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165, 9 L. Ed. 2d 659, 83 S. Ct. 554 (1963) held that even in times of national emergency the Constitution requires that the right to procedural due process must be protected.

In Stanley v. Illinois, 405 U.S. 645, 646, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) this Court stated on the issue between "prompt efficacious procedures" and Constitutional rights:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." See also, Jackson v. Indiana, 406 U.S. 745, 723-724 (1972); Vitek v.Jones, ____ U.S. ____, 63 L.Ed. 2d 552, 100 S. Ct. 1254 (1980).

Point II

It is unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amendment to try and convict an attorney of misconduct and punish him by suspension on a standard of proof of "fair preponderance of the evidence."

The question of whether "a fair preponderance of evidence" is a constitutionally permissible standard of proof in an

attorney disciplinary proceeding and what is the constitutionally permissible standard of proof are important and substantial constitutional questions that deserve plenary review because of the extremely high and precious nature of the appellant's interests at stake of "liberty" and "property", because the standard applied is the lowest standard applicable in a civil action between private parties involving a monetary dispute, because the decision at issue that this is a civil proceeding directly conflicts with the holding of this Court in Matter of Ruffalo, 390 U.S. 544, 551 (1968) that it is a quasi-criminal proceeding, indicating the requirement for a higher standard of proof, because the Code of Professional Responsibility, the penal code for attorneys,* is the same or almost the same in the fifty states and District of Columbia, and that there is a clear conflict between New York and the majority of States, four United States Courts of Appeal,

*See, Rule 691.2, Appendix,p. 52a

and the United States District Court for the Southern District of New York, all requiring a higher standard of proof, generally "clear and convincing" evidence, in the light of Addington v. Texas, _____U.S. _____, 99 S. Ct. 1804 (1979), and in light of the granting of review by this Court in Doe v. Delaware, 79-5932 which includes the issue of standard of proof in a child custody-parent fitness case, and the granting of certiorari in Steadman v. S.E.C., on April 28, 1980, on the issue of standard of proof in an S.E.C.-broker disciplinary proceeding, docket number 79-1266.

The need for review by this Court is highlighted by the fact that by statute, in the State of New York, outside of New York City, as a matter of constitutional due process, the standard of proof in the trial of a traffic offense is "beyond a reasonable doubt" and within the City of New York, is "clear and convincing evidence". Rosenthal v. Hartnett, 36 N.Y. 2d

269, 367 N.Y.S. 2d 247 (1975)!

The referee and Appellate Division held that this attorney disciplinary proceeding was a civil proceeding and that the civil standard of proof of "fair preponderance of the evidence" was applicable (9a,19a). The holding that this is a civil proceeding directly conflicts with the holding of this Court in Matter of Ruffalo, 390 U.S. 554, 551 (1968) that the proceedings are penal, "adversary proceedings of a quasi-criminal nature." Also, Spevak v. Klein, 385 U.S. 511, 17 L. Ed. 2d 574, 578 (1967); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 731 (1971) (Douglas and Black, JJ., dissenting); Erdmann v. Stevens, 458 F. 2d 1205, 1209-1210 (2d Cir.) cert. den. 409 U.S. 889 (1972); Matter of an Attorney, 83 N.Y.S 164, 165 (1880): it is "of a public nature and quasi-criminal"; Matter of Kelly, 59 N.Y. 595, 596 (1874); In re Post, 7 N.Y.S. 438 (G.Term, 2d Dept. 1889): it is

"of a highly penal character, the courts should require full proof in justification of the exercise of their summary power."

This Court in Addington v. Texas, ____ U.S.____, 99 S. Ct. 1804, 1808-1810(1979) held that the preponderance of the evidence standard of proof was the lowest standard of proof applicable in a purely civil action between private parties involving a monetary dispute, and that in such a case, "society has a minimal concern with the outcome" so that "litigants thus share the risk of error in roughly equal fashion."

In Addington, supra, this Court held that the intermediate standard of proof of "clear and convincing", or "clear unequivocal and convincing" or similar combinations, was required in civil cases involving allegations of fraud or other quasi-criminal wrongdoing. This case, even if had been a civil case (which it is not) involves allegations of fraud and conversion - quasi-criminal wrongdoing -which

could be criminal charges under New York McKinney's Penal Law, Title J. "Offenses Involving Theft", and Title K, "Offenses Involving Fraud".

As stated above, pp. 25-27 , the nature of the interests at stake are of the highest in the scale of society and human standards, and involves the appellant's fundamental rights of "liberty" and "Property". "Liberty is not confined to mere freedom from bodily restraint." Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Bridges v. Wixon, 326 U.S. 135, 152-157 (1945); Truax v. Raich, 239 U.S. 33, 41 (1915); Friendly, Some Kind of Hearing, 123 U.Pa.L. Rev. 1267, 1295-1297 (1975).

> "The issue is vital to the party assailed. An adverse decision dooms him always to disgrace and often to want and poverty." Matter of Eldridge, 82 N.Y. 161, 167 (1880).

A higher standard of proof is required. From time immemorial, civil charges of fraud or misrepresentation required proof

by "clear and convincing evidence" in New York, Simcusky v. Saeli, 44 N.Y. 2d 442, 452-453 (1978), and in every other jurisdiction, state and federal. 9 Wigmore, Evidence, Section 2498 (3rd Ed. 1940),and supplement 1979; Woodby v. INS, 385 U.S. 276, 285, note 18 (1966); Addington v. Texas, 441 U.S._____, 99 S.Ct. 1804, 1808(1979).

In United States v. Fatico, 458 F. Supp. 388, 404-405 (E.D.N.Y. 1978) Judge Jack B. Weinstein noted, citing decisions of this Court:

> "In some civil proceedings where moral turpitude is implied the courts utilize the standard of 'clear and convincing evidence' - a test somewhat stricter than preponderance of the evidence. See, e.g. Gertz v. Robert Welch, Inc., 418 U.S. 323, 331, 332, 94 S.Ct. 2997, 3003, 41 L.Ed. 2d 789 (1974)(libel); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50-52, 91 S. Ct. 1811, 1823, 1824, 29 L. Ed. 2d 296 (1971)(libel); Tippett v. State of Maryland, 436 F. 2d 1153, 1165-66 (4th Cir. 1971)(Delinquency Act)(Sobeloff,J., concurring and dissenting in part; Collins Securities Corp. v. SEC, 562 F.2d 820, 824-826 (D.C.Cir. 1977)(Securities fraud); 9 Wigmore, Evidence, Section 2498, p.329 (3rd Ed. 1940)(fraud, undue influence, parol or constructive trusts)."

This Court applied the highest standard of proof of "beyond a reasonable doubt" in civil patent cases. The Barbed Wire Patent, 143 U.S. 275, 284 (1892); Adamson v. Gilliland, 242 U.S. 350 (1917); Coffin v. Ogden, 85 U.S. 120 (1873).

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' In re Winship, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed. 2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 1808 (1979).

In Speiser v. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958), the Supreme Court said:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value - as a criminal defendant his liberty - this margin of error is reduced as to him by the pro-

> cess of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt."

The standard of proof is as much a fundamental component of a fair trial under the Due Process Clause in this highly penal, quasi-criminal case, as in an ordinary criminal case. See, People v. Patterson, 39 N.Y. 2d 288, 295-302, 383 N.Y.S. 2d 573, 577-582, 347 N.E. 2d 898, aff'd. sub nom Patterson v. New York, 432 U.S. 197 (1977).

This Court in Speiser v. Randall, 357 U.S. 513, 520-521 (1958) showed that the higher the interests at stake, the higher the standards of due process that must be accorded:

> "And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."

And similarly, in Jenkins v. McKeithen, 395 U.S. 411, 427-429 (1969); Spevack v. Klein, 388 U.S. 511 (1967); In re Ruffalo, 395 U.S. 544 (1968); In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1, 47-50 (1967); Greene v. McElroy, 360 U.S. 474, 496-497 (1969); Schneiderman v. United States, 320 U.S. 118, 159-160 (1943); Hollis v. Smith, 571 F. 2d 685 (2d Cir. 1978); In re Woll, 387 Mich. 154, 194 N.W. 2d 835, 839-840 (1972); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1295-1297 (1975).

On this issue, this case conflicts with the decision of this Court in Ex Parte Wall, 107 U.S. 265, 275, 288 (1882) and dissent by Fields, J., 107 U.S. at 295-296, all four United States Courts of Appeals which have decided cases on this issue, namely the Fourth, Seventh, Eighth, and District of Columbia, the United States District Court for the Southern District of New York, and the majority of the states,

namely, 34 states out of a total of 44 states which require a standard of proof higher than preponderance of evidence, namely, clear and convincing, or equivalent.** This Court in Ex Parte Wall, 107 U.S. 265, 288, 275, 2 St. Ct. 569, 588, 27 L.Ed. 552 (1882) showed that the standard of proof employed in that attorney disciplinary proceeding was "clear of all doubts", that no disciplinary action ought to be taken against an attorney "except in clear cases of misconduct". Justice Field in his dissent in Ex Parte Wall, 107 U.S. at 295-296 showed that the standard of proof was "positively conclusive beyond a reasonable doubt", and 107 U.S. at 318, "by the clearest legal proof."

Six (6) states were not found to have any reported case on this issue. Ten (10) states, including New York, applied a standard of proof of preponderance of evidence and held that the proceedings are

**Set forth at Appendix pp. 85a-97a.

civil. Of these ten (10) states, seven(7) had or have unreversed, cases requiring a higher standard of proof. One state, Georgia, requires a standard of proof of "beyond a reasonable doubt." One state, Kentucky, in actual practice employs the standard of "beyond a reasonable doubt", even though the announced standard is "reasonable preponderance of the evidence." This listing of the cases is set forth in the Appendix at pp. 85a-97a.

The need for a uniform standard of proof in attorney disciplinary cases is shown by the fact that there is in each of the fifty states and the District of Columbia the same or almost the same Code of Professional Responsibility***, which is the penal code for attorneys. The Preamble and Preliminary Statement in the ABA Model Code of Professional Responsibility and in the New York counterpart, which tracks it, states that

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*** Appendix ,pp.74a-84a.

> "The Disciplinary Rules should be uniformly applied to all lawyers regardless of the nature of their professional activities."

It is fundamentally unfair that a charge of misconduct involving the same Code of Professional Responsibility should be treated differently from state to state, so that in the lower standard state, an attorney would be convicted on evidence on which he would be acquitted in a higher standard state.

There is a grave need for this Court to resolve this important, substantial Constitutional issue affecting all attorneys subjected to disciplinary proceedings in every jurisdiction, state and federal.

Point III

Conviction on a Charge not made denied appellant due process under the 14th Amendment

In Zolondek, appellant was convicted of misrepresentation, a charge not made, supra, pp. 17-18 , which violated appellant's constitutional right to due process

of law to have notice and an opportunity to be heard. Matter of Ruffalo, 390 U.S. 544, 550-552 (1968). It directly conflicts with the precise ruling of this Court.

Point IV

Conviction on the charges was unsupported by the evidence and violated appellant's right to due process under the 14th Amendment

The appellant was convicted by "converting escrow funds" under DR 9-102(A) in Santora, even though appellant never received any money in escrow from the Santoras, even though the down payment did not belong to the Santoras, Lawrence v. Miller, 86 N.Y. 131, 139-140 (1881), and even though there was no attorney-client relation.

The appellant was convicted of "neglecting" a meritless case under DR 6-101(A)(3) even though he did not neglect the case but prosecuted it as far as possible including placing it on the trial calendar, and even though it was his

right and duty under DR 7-101(B)(1) not to prosecute the case further, supra, pp. 21 footnote 7, and even though, as a matter of law, no "prejudice" can result where the case has no merit, supra, pp. 21 footnote 8.

An attorney may not be disciplined unless his activity in fact involved the type of misconduct at which the disciplinary rule is said to be directed. In re Primus, 436 U.S. 412, 436-438 (1978).

Conviction without evidence violates due process of law under the 14th Amendment. Konigsberg v. State Bar, 353 U.S. 252, 256 (1957); Thompson v. Louisville, 362 U.S. 199 (1960); Vachon v. New Hampshire, 414 U.S. 478 (1974); see also, Pilon v. Bordenkirker, _____ U.S. _____, 100 S. Ct. 7 (1979); Jackson v. Virginia, 443 U.S. _____, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Garner v. Louisiana, 368 U.S. 157, 163 (1961).

Conclusion

For the reasons stated this Court should note probable jurisdiction and set this case for plenary hearing and argument.

Dated: August 26, 1980

Respectfully submitted,

Bruce Provda
299 Broadway
New York, New York 10007
212-227-4785

OPINIONS-Appellate Division Second Depart.
dated July 14, 1978
(NOT TO BE PUBLISHED)

No. 3274 In the Matter of Charles Sutton an attorney & counselor-at-law,

Joint Bar Associate Grievance Committee for the Second and Eleventh Judicial Districts, respondents; Charles Sutton, respondent.

Motion by respondent (1) to dismiss the petition to discipline the respondent for professional misconduct and (2) to vacate the order of this court dated April 25, 1977 which authorized the petitioner to commence the proceeding, on the ground that petitioner failed to comply with the rules of this court (22A NYCRR 691.4).

Motion denied. The parties should proceed promptly to the hearing.

MOLLEN, P.J., HOPKINS, MARTUSCELLO, LATHAM and DAMIANI, JJ., concur.

OPINION-REFEREE'S REPORT
dated May 11, 1979

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPT.

In the Matter of CHARLES SUTTON, an attorney and counselor at law:

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner,

CHARLES SUTTON,

Respondent.

REFEREE'S REPORT

TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT:

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts instituted this disciplinary proceeding against CHARLES SUTTON (Respondent) an attorney and counselor at law admitted to practice by this Court in the year 1952.

The petitioner was appointed to prosecute this proceeding against the Respondent

by order of this Court dated and filed on April 25, 1977. By order dated December 19, 1977, I was appointed to hear and report on the issues raised. The first of the charges against the Respondent, Charge 1, in essence alleges that the Respondent, who was the sole shareholder of Plover Builders Inc., for said corporation, entered into a contract (Petitioner's Exhibit 1) to sell the premises 30 Violet Road, Kingspark, Smithtown, New York, to Mr. and Mrs. Rocco Santora for $25,500.00; that said contract among other things, provided that the same was contingent upon the purchasers procuring an FHA mortgage commitment in the minimum amount of $22,500.00 and that if unable to procure such a commitment, the contract could be cancelled.

The contract further provided that the Respondent would hold the down payment of

$1,500.00 in escrow until closing. It was further alleged that after the execution of the contract, at which Marvin Korobow acted as attorney for the purchasers, there was delivered to the Respondent the purchasers' personal check for $1,500.00 drawn on the National Bank of North America, to be held in escrow as aforesaid; that without the knowledge or consent of the purchasers' attorney, the Respondent called Mrs. Santora, at her home, and advised her that the $1,500.00 check which had been made payable to his order at the time of the execution of the contract, was not certified and therefore, a substitute check would have to be prepared. Actually, the check delivered at the time the contract was made had written on the face of it, the words, "In escrow in re premises 30 Violet Road..." and was payable to the order of Respondent "as attorney"

(Petitioner's Exhibit 2). It is further alleged that in addition and pursuant to the inquiry of Mrs. Santora, the Respondent knowingly and with intent to deceive and defraud, falsely advised her that her attorney, Korobow, had consented to the issuance of the second check; that on the same day Mrs. Santora accompanied the Respondent to her bank and he assured her that the provision "as attorney" was not necessary on the second check and she accordingly, issued her personal second check payable to the order of the Respondent for $1,500.00. At the bank, Respondent endorsed said check and cashed it and according to the petition, converted the escrow funds.

It further alleges that the purchasers were advised by Respondent that he had an FHA mortgage commitment for the subject premises for them in excess of the minimum

amount of $22,500.00 called for in the contract; but that no such mortgage commitment was ever procured for the purchasers and they were unable to consummate the transaction. Respondent never returned the $1,500.00 down payment made by the purchasers.

It is further charged that the Respondent was retained by Mr. and Mrs. William Zolondek in the year 1957 to prosecute an action for personal injuries sustained by their son, Martin, at the time six years of age, when he had a fall from a mechanical hobby horse. An action was commenced, issue was joined on August 7, 1961 and a Note of Issue was filed by Respondent on July 6, 1964. In 1966, the case was marked off the calendar, as abandoned pursuant to Rule 3404 of the CPLR (TH573). It is charged in said petition that (a) Respondent grossly neglected the interests of his

clients in that he permitted the case to be marked off the calendar and dismissed (b) despite numerous calls and meetings and inquiries as to the status, Respondent failed to apprise them that the case had been dismissed.

It is further charged that in or about the year 1966, Respondent was retained by Nathanial DeLoach to prosecute a claim for personal injuries resulting from an automobile accident which had occurred on November 12, 1966 and that thereafter, (a) Respondent failed to communicate with his client from about 1973 to March, 1976, after DeLoach had filed a complaint with the Grievance Committee concerning the matter; (b) Respondent had failed to advise his client of the status of the case; that Respondent knew or should have known, in committing the acts aforesaid, that he was violating the applicable statutes of the State

of New York; the Canons of Professional Ethics of the State of New York; the Canons of Professional Ethics of the New York State Bar Association, as amended, and the Code of Professional Responsibility of the New York State Bar Association, as amended and his inherent duty as an attorney and counselor at law.

The Petitioner prays that the Respondent be disciplined on the foregoing charges pursuant to Section 90 of the Judiciary Law of the State of New York.

Issue was joined by the answer of the Respondent, in which he denied the allegations of paragraphs one and two of the petition, charging him with professional misconduct. He admits the allegations of paragraph three and essentially the allegations of paragraph four. He denies paragraph five, charging misconduct, etc., and then proceeds to elaborate on his version of the facts in 34 pages of Brief.

In essence, we have the claim of Respondent that he consulted the purchasers' attorney and had his approval for the substitution of a new check for $1,500.00, which would omit therefrom the notation that the funds were to be held in escrow and that the check was to be made payable to his name as payee, omitting the words "as attorney". He then asserts in his defense that since the purchasers did not get a commitment for a mortgage, as required by the contract, that the purchasers had defaulted and that he was entitled to keep the down payment.

It should be remembered that this is a civil proceeding and the petitioner need only prove the charges by a fair preponderance of the evidence. Feola v. N.Y.S. Bar Association 37 APP Div (2) 789.

The Proof

CHARGE ONE

Mrs. Santora testified before me that when after the contract had been executed, Respondent telephoned her on June 25, 1971, he said then that because the first check of June 25, 1971 was not certified, he needed a new check; he told her that her attorney had been informed and that he had consented to it. He took her to her bank, the Valley National Bank at Kingspark, where a new check was issued by her. He advised her to date the check the same day as the first one, but to omit the legend "in escrow re premises 30 Violet Road, Kingspark, Smithtown, New York," and that the words "as attorney" should also be omitted. He immediately cashed the new check.

Mr. Korobow, attorney for the purchasers, testified that in his conversation with the Respondent (at the time of the execution

of the contract) when dealing with the question of procuring the mortgage required, stated that there was a broker, Olita, who would apply for same, but, according to Korobow, Respondent said they would leave the broker out of the transaction and that the Respondent would undertake to get the mortgage for them. (Pp. 161 and 162). Korobow denied that the Respondent had telephoned him for permission to see the purchasers or substitute checks. He testified that he first learned of the switch at the time the purchasers complained to the Bar Association, around January of the following year and long after the check had been substituted. (P. 165)

During the course of the hearing before me, counsel for the Respondent was being interrupted by the Respondent who partially took over the examination of the witnesses.

The attorney for the buyers further testified that his clients wanted to go into the premises to make some repairs so that the property would be more inviting to an appraiser. He advised his clients against it. However, on July 2, 1971, which was after the Respondent had cashed the second check, the buyers went into the property to repair broken windows and put a lock on a door in order to facilitate obtaining an FHA mortgage commitment. (pp. 52 to 54 inclusive)

Five witnesses, namely attorney Korobow, Mr. Mathes, broker Olita and the two Santoras, testified that the Respondent stated that he would obtain a mortgage and that he had an FHA commitment.

The witness, attorney Korobow, testified that Sutton had undertaken to get the mortgage. (P. 187) Mathes corroborated him. (P. 398) Olita testified to the same effect. (Pp. 391-392) Mrs. Santora testified that

Respondent said he would get the mortgage, "He wouldn't let anybody else do it." (P. 38) Mr. Santora testified to the same effect. (P. 135)

Although the Respondent denied that he had ever agreed to procure the mortgage, I believe the testimony of the above-mentioned five witnesses.

I also believe attorney Korobow's testimony that he was not consulted about the substitution of checks. The money was never returned.

I am of the opinion that the Respondent, without the consent or knowledge of the buyers attorney, procured the release of the escrow funds and converted the same to his own use.

CHARGE TWO

The evidence disclosed that the Respondent had been retained on behalf of Zolondek's son, who was injured in a fall from

a mechanical hobby horse. He was then six years old. The summons was served in 1960. In 1964, Respondent caused the matter to be placed on the calendar. An application by him for a "General Preference" was in that year denied. In 1965, the case was marked off the calendar, pursuant to Rule 3404, CPLR 573, as having been abandoned. The Respondent testified that this was the first negligence case he had handled as an attorney and he agreed to a fee of one-third (1/3) of the recovery. Mrs. Zolondek testified that the Respondent kept advising her that he was trying to settle the matter and that the case was on the calendar. She testified that between 1964 and 1972, she called the Respondent and went up to his office and until 1972, he continuously advised her that there was no hope of settling the case. In 1972, she filed a complaint against the Respondent with the Brooklyn

Bar Association. Respondent, in his testimony, stated that he had advised Mrs. Zolondek that the case could not be settled and lacked merit. He admitted that he failed to advise her that the action was dismissed.

In my opinion, Respondent did neglect the case and he did misrepresent that the case was still on the calendar, thereby prejudicing their right to revive the action. The case did lack merit, but whether the case did or did not have merit is not the issue. The Respondent should have told his clients, before the abandonment, that the case lacked merit and that it had been dismissed.

The DeLoach Matter

DeLoach testified that he retained the Respondent in 1966 to prosecute a claim for injuries he sustained in an automobile accident.

Between 1969 and 1973, the witness was

unable to give DeLoach any forwarding address; it appears that DeLoach also had moved and Respondent was unable to locate him. In May of 1978, after the instant proceeding was commenced, a judgment was entered in favor of DeLoach for $800.00. The proof on this charge is very scant and the charge should be dismissed.

Character references by way of three letters were submitted from present or former Supreme Court or acting Supreme Court Justices. They all certify to Respondent's trustworthiness.

In conclusion, I am of the opinion that Charge One is sustained and that Charge Two, in so far as it deals with Zolondek, is sustained and that in so far as it deals with DeLoach, is not sustained and should be dismissed.

Dated: Brooklyn, New York
May 11, 1979

Respectfully submitted:

WILLIAM T. COWIN

OPINION-APPELLATE DIVISION
dated November 13, 1979

November 13, 1979

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

HOPKINS, J.P., DAMIANI, MANGANO, COHALAN and GIBBONS, JJ.

In the Matter of CHARLES SUTTON,
an attorney.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner;

CHARLES SUTTON,

Respondent.

Nos. 3006 and 3006A

DISCIPLINARY proceeding instituted by the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts. By order of this court dated December 19, 1977, the issues were referred to Hon. WILLIAM T. COWIN, a retired Justice of the Supreme Court, to hear and report.

Frank A. Finnerty, Jr., Brooklyn, N.Y. (Gary L. Casella of counsel), for petitioner.

Singer and Block, Brooklyn, N.Y. (Irving B. Singer of counsel), for respondent.

P E R C U R I A M. The respondent was admitted to practice by this court on October 22, 1952. In this proceeding to discipline him for professional misconduct, the petitioner moves to confirm in part and disaffirm in part the report of the Referee to whom the issues were referred for hearing and report and respondent cross-moves to disaffirm in part and affirm in part said report.

The Referee found respondent guilty of converting to his own use escrow funds in the amount of $1,500 from the proposed purchaser of real property without the knowledge or consent of the purchaser's attorney and neglecting a legal matter for which he had been retained, resulting in prejudice

to his clients. Another allegation of misconduct was not sustained by the Referee.

After reviewing all of the evidence we are in full agreement with the report of the Referee. Petitioner's motion and respondent's cross motion are granted to the extent that the Referee's report is confirmed. The motion and cross motion are otherwise denied.

In determining an appropriate measure of discipline we have taken into consideration respondent's prior unblemished record, the excellent character references attesting to his trustworthiness and certain other mitigating circumstances. Accordingly, it is our opinion that the respondent should be, and he hereby is, suspended from the practice of law for a period of three years commencing December 15, 1979 and until the further order of this court.

HOPKINS, J.P., DAMIANI, MANGANO, COHALAN and GIBBONS, JJ., concur.

OPINION-APPELLATE DIVISION-REARGUMENT
AND LEAVE TO APPEAL-dated Jan. 2, 1980

No. 7459 In the Matter of Charles Sutton, an attorney & counselor at law.

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, petitioner; Charles Sutton, respondent.

Motion by respondent (1) for reargument of his cross motion to disaffirm part of the Referee's report dated May 11, 1979 as to count one (Santora) and as to count two (Zolondek), or in the alternative, (2) for leave to appeal to the Court of Appeals from the order of this court dated November 13, 1979, and (3) to stay the execution of said order of the three year suspension, pending said appeal or to extend the effective date of said suspension for a period of thirty (30) days from December 15, 1979, and (4) for reconsideration of the penalty imposed and a reduction of same.

Motion granted only to the extent of extending the effective date of the suspen-

sion to January 14, 1980. In all other respects, motion denied.

HOPKINS, J.P., DAMIANI, MANGANO, GIBBONS and COHALAN, JJ., concur.

New York Court of Appeals, slip opinion dated February 7, 1980

2 Mo. No. 92

In the Matter of
Charles Sutton, an Attorney
and Counsellor-at-Law.
Joint Bar Grievance Committee
for the Second and Eleventh
Judicial Districts,

Respondent,

vs.

Charles Sutton,

Appellant.

(A) Motion to dismiss the appeal herein granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

(B) Motion for a stay dismissed as academic.

New York Court of Appeals, slip opinion dated April 1, 1980

2 Mo. No. 284
In the Matter of
Charles Sutton, an Attorney
and counsellor-at-law.

Joint Bar Grievance Committee
for the Second and Eleventh
Judicial Districts,

Respondent,

vs.

Charles Sutton,

Appellant.

Motion for reargument of motion to dismiss appeal taken as of right &c. denied.

Motion for leave to appeal denied.

Motion for a stay dismissed as academic.

New York Court of Appeals, slip opinion dated May 29, 1980

2 Mo. No. 559

In the Matter of
Charles Sutton, an Attorney
and Counselor at Law.
Joint Bar Association Grievance
Committee for the Second and
Eleventh Judicial Districts,

Respondent,

Charles Sutton,

Appellant.

Motion for reargument denied.

Motion for a stay dismissed as academic.

ORDER-APPELLATE DIVISION
dated July 14, 1978

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 14, 1978.
(NOT TO BE PUBLISHED)

HON. MILTON MOLLEN, Presiding Justice,
HON. JAMES D. HOPKINS,)
HON. M. HENRY MARTUSCELLO,) Associate
HON. HENRY J. LATHAM,) Justices
HON. VINCENT D. DAMIANI.)

In the Matter of Charles Sutton, an attorney and counselor-at-law.

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner:

Charles Sutton,

Respondent.

Order

A disciplinary proceeding having been instituted in this court upon the petition of the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, in respect to Charles Sutton, an attorney and counselor-at-law, admitted to

practice by this court on October 22, 1952; the petition praying that the respondent be disciplined for professional misconduct upon the charges therein set forth: the proceeding having come on before this court by a notice of petition, dated November 1, 1977: and the respondent having filed an answer to the petition; thereafter, this court, by an order dated December 19,1977, having referred the issues raised by the petition and the answer to Hon. WILLIAM T. COWIN, a Retired Justice of the Supreme Court, to hear and to report, with his finding upon each of the issues: and the respondent having moved, by a notice of motion dated June 2, 1978, (1) to dismiss the petition to discipline the said respondent for professional misconduct and (2) to vacate the order of this court, dated April 25, 1977, which authorized the petitioner to commence the proceeding,

on the ground that the petitioner failed to comply with the Rules of this court (22A NYCRR 691.4):

Now, upon the said notice of motion and the affidavit of Charles Sutton and the exhibits attached thereto in support of the said motion; the affidavit of Gary L. Cassella in opposition thereto; the affidavits of Irving B. Singer and Charles Sutton in reply thereto and the sur-reply affidavit of Gary L. Cassella in opposition thereto; and Irving B. Singer, Esq., having appeared of counsel for the respondent and Gary L. Cassella, Esq., having appeared of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby denied, and it is further

ORDERED that the parties promptly proceed to the hearing.

IRVING N. SELKIN

ORDER-APPELLATE DIVISION
dated November 13, 1979

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 13, 1979.

HON. JAMES D. HOPKINS, Justice Presiding,
HON. VINCENT D. DAMIANI,)
HON. GUY J. MANGANO,) Associate
HON. JOHN P. COHALAN, JR.,) Justices
HON. DAVID T. GIBBONS.)

In the Matter of Charles Sutton, an attorney.

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner;

Charles Sutton,

Respondent.

Order of Suspension

A disciplinary proceeding having been instituted in this court upon the petition of the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, in respect to Charles Sutton, an attorney and counselor-at-law, admitted to practice by this court on October 22, 1952;

the petition praying that the respondent be disciplined for professional misconduct upon the charges therein set forth; the proceeding having come on before this court by a notice of petition, dated November 1, 1977; and the respondent having filed an answer thereto; and this court by an order dated December 19, 1977, having referred the issues raised by the petition and the answer to the Hon. WILLIAM T. COWIN, a retired Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues; thereafter, the said Justice having held a hearing and having filed his report with this court on May 16, 1979 together with a transcript of the hearing and the exhibits; and the petitioner having moved, by a notice of motion dated May 24, 1979, to affirm in part and disaffirm in part the report of the Referee and the respondent having cross

moved, by a notice of cross-motion dated May 25, 1979 and amended June 5, 1979, to disaffirm in part and affirm in part the said report;

Now, upon the said petition verified November 1, 1977; the said answer verified November 22, 1977; the report, the transcript, the exhibits; the petitioner's notice of motion and the affidavit of Gary L. Casella in support of the said motion; the respondent's said notice of cross-motion, as amended, and the affidavit of Irving B. Singer in support of the said cross motion; and the affidavit of Gary L. Casella in opposition thereto and in further support of petitioner's motion; and upon all the papers filed herein; and Gary L. Casella,Esq., having appeared of counsel for the petitioner and Irving B. Singer, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and

upon the per curiam opinion herein, dated November 13, 1979, heretofore filed and made a part hereof, it is unanimously

ORDERED that the petitioner's motion and the respondent's cross-motion are hereby granted to the extent that the said Referee's report is hereby confirmed, and it is further

ORDERED that the said motion and cross-motion are otherwise denied, and it is further

ORDERED that the respondent Charles Sutton is hereby suspended from the practice of the law for a period of three years, commencing December 15, 1979 and continuing until the further order of this court with leave to respondent to apply for reinstatement after the expiration of said period of three years upon furnishing satisfactory proof: (a) that during the said period he has actually refrained from practicing law

or attempting to practice as an attorney and counselor at law; (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended and resigned attorneys, a copy of such rules being annexed hereto and made a part hereof; and (c) that he has otherwise properly conducted himself, and it is further

ORDERED that, pursuant to statute (Judiciary Law, Sec. 90), during the period of suspension and until the further order of this court, the respondent CHARLES SUTTON be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or agent, clerk or employee of another; (2) from appearing as an attorney or counselor at law before any court, judge, justice, board, commission or other

public authority: (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto: and (4) from holding himself out in any way as an attorney and counselor at law.

Enter

IRVING N. SELKIN

Clerk of the
Appellate
Division

ORDER-APPELLATE DIVISION
REARGUMENT AND LEAVE TO
APPEAL, dated January 2,
1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 2, 1980.

HON. JAMES D. HOPKINS, Justice Presiding,
HON. VINCENT D. DAMIANI)
HON. GUY J. MANGANO) Associate
HON. DAVID T. GIBBONS) Justices
HON. JOHN P. COHALAN, JR.)

In the Matter of Charles Sutton, an attorney.

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner:

Charles Sutton,

Respondent.

Order on Motion

In the above entitled disciplinary proceeding, this court, by an order dated November 13, 1979, inter alia, having granted the petitioner's motion and the respondent's cross motion to affirm in part and to disaffirm in part the report of the Referee herein only to the extent of confirming the

said report and having suspended the respondent from the practice of the law for a period of three years commencing December 15, 1979; and the respondent having moved, by an order to show cause dated December 14, 1979, (1) for reargument of the said cross motion to disaffirm part of the said Referee's report dated May 11, 1979 as to count one (Santora) and as to count two (Zolondek), or in the alternative, (2) for leave to appeal to the Court of Appeals from this court's said order dated November 13, 1979, and (3) to stay the execution of said order of the three year suspension, pending said appeal or to extend the effective date of suspension for a period of thirty (30) days from December 15, 1979, and (4) for reconsideration of the penalty imposed and a reduction of same:

Now, on reading and filing the said

order to show cause and the affidavits of Sidney J. Guran and Charles Sutton in support of the said motion and the affidavit of Gary J. Casella in opposition thereto; and upon all the papers filed herein; and the said motion having been submitted by Sidney J. Guran, Esq., of counsel for the respondent and submitted by Gary J. Casella, Esq., of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby granted only to the extent of extending the effective date of suspension to January 14, 1980, and it is further

ORDERED that, in all other respects, the said motion is denied.

Enter,

IRVING N. SELKIN
Clerk of the Appellate Division

ORDER-NEW YORK COURT OF APPEALS
dated February 7, 1980

STATE OF NEW YORK
COURT OF APPEALS

At a Session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of February A.D. 1980

PRESENT, Hon. LAWRENCE H. COOKE,
Chief Judge, presiding.

---

2 Mo. No. 92 (B)
In the Matter of
Charles Sutton, an Attorney and Counsellor-at-Law.
Joint Bar Grievance Committee for the Second and Eleventh Judicial Districts,
Respondent,

vs.

Charles Sutton,
Appellant.

A motion for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed as academic.

Joseph W. Bellacosa
Clerk of the Court

ORDER-NEW YORK COURT OF APPEALS
dated April 1, 1980

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the First day of April A.D. 1980.

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

---

2 Mo. No. 284
In the Matter of
Charles Sutton, an Attorney and counsellor-at-law.

Joint Bar Grievance Committee for the Second and Eleventh Judicial Districts,
Respondent

vs.

Charles Sutton,
Appellant.

A motion having heretofore been made herein upon the part of the appellant (1) for leave to appeal to the Court of Appeals, (2) for a stay, and (3) for reargument of motion to dismiss appeal taken as of right & c., papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDER-NEW YORK COURT OF APPEALS
dated April 1, 1980 (continued)

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for re-argument of motion to dismiss appeal taken as of right &c. be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Joseph W. Bellacosa
Clerk of the Court

ORDER-NEW YORK COURT OF APPEALS
dated May 29, 1980

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-ninth day of May A.D. 1980.

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

---

2 Mo. No. 559
In the Matter of
Charles Sutton, an Attorney and Counselor at Law.
Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Respondent,

Charles Sutton,

Appellant.

A motion having heretofore been made herein upon the part of the appellant (1) for reargument of motion for leave to appeal, (2) for reargument of motion to dismiss appeal taken as of right, and (3) for a stay in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for re-argument be and the same hereby is denied in each respect; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Joseph W. Bellacosa
Clerk of the Court

NOTICE OF APPEAL TO NEW YORK COURT OF APPEALS
Dated:August 13, 1980;Filed: August 18,1980

COURT OF APPEALS:STATE OF NEW YORK

In the Matter of Charles Sutton,
an attorney and counsellor at law,

The Joint Bar Association Grievance Committee
For the Second and Eleventh Judicial Districts,

Petitioner-Respondent,

v.

CHARLES SUTTON,

Respondent-Appellant.

Please Take Notice that the undersigned hereby appeals to the United States Supreme Court from the orders of this Court dated and entered February 7,1980, dismissing the appeal taken as of right, dated and entered April 3, 1980 denying reargument and leave to appeal, dated and entered May 29, 1980 denying re-argument of appellant's motion for leave to appeal and other relief, and from each part adverse to appellant.

Dated:August 13,1980
New York, New York

Yours,etc.,
Sidney J. Guran
Attorney for Appellant
299 Broadway, New York, N.Y.,10007

NOTICE OF APPEAL TO NEW YORK APPELLATE DIVISION dated August 13, 1980
Filed: August 18, 1980

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of Charles Sutton,
an attorney and counsellor at law,

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner-Respondent,

v.

CHARLES SUTTON,

Respondent-Appellant.

Please Take Notice that the undersigned hereby appeals to the United States Supreme Court from the order of this Court dated and entered November 13, 1979 and from the order dated and entered January 2, 1979, and from each and every part thereof adverse to appellant.

Yours, etc.

Dated: August 13, 1980
New York,

Sidney J. Guran
Attorney for Appellant
299 Broadway
New York,N.Y.,10007

To: Clerk of Court
To: Frank A. Finnerty, Jr.,Esq.,Attorney
To: Attorney-General,New YorkState

Amended Notice of Appeal to New York Court of Appeals Filed August 25, 1980

Court of Appeals:State of New York

- -

In the Matter of Charles Sutton,
an attorney and counsellor at law,

The Joint Bar Association Grievance Committee
For the Second and Eleventh Judicial Districts,

Petitioner-Respondent,

v.

Charles Sutton,

Respondent-Appellant.

- -

Please Take Notice that the undersigned hereby appeals to the United States Supreme Court from the orders of the Court dated and entered February 7,1980, April 1, 1980, and May 29,1980 pursuant to 28 U.S.C. Section 1257(2).

Redated: August 22, 1980

Yours, etc.
Sidney J. Guran
Attorney for Appellant
299 Broadway
New York,N.Y. 10007
212-233-8000

To: Clerk,New York
Court of Appeals

To: Frank A. Finnerty,
Jr., Esq.,
Attorney for Petitioner

To: Attorney General,
State of New York
Albany, N.Y,

Filed August 25, 1980 :
Amended Notice of Appeal to New York Appellate Division;Second Department

New York Appellate Division:Second Department

- -

In the Matter of Charles Sutton, an attorney and counsellor at law,

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner-Respondent,

v.

Charles Sutton,

Respondent-Appellant.

- -

Please Take Notice that the undersigned hereby appeals to the United States Supreme Court from the orders of this Court dated and entered November 13, 1979 and January 2, 1980 pursuant to 28 U.S.C. Section 1257(2).

Redated:August 22, 1980

TO:Clerk, Appellate Division

To:Frank A.Finnerty, Jr, Esq.
Attorney for Petitioner

Yours, etc.
Sidney J. Guran
Attorney for Appellant
299 Broadway
New York,N.Y.,10007
212-233-8000

TO:Attorney General:State of New York
Albany, New York

UNITED STATES CONSTITUTION:

AMENDMENT XIV :

DUE PROCESS: EQUAL PROTECTION:

Section 1.

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES:

28 U.S.C. Section 1257 (2):

By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

NEW YORK JUDICIARY LAW, Section 90(2):

2. The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration

of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or

of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

RULES, NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT:
22A NYCRR 691 :
Section 691.1 Application

(a) This Part shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have offices in the second judicial department, or who are admitted to practice by a court of another jurisdiction and who regularly practice within this department as counsel for governmental agencies or as house counsel to corporations or other entities, or otherwise. In addition, any attorney from another State, territory, district or foreign country admitted pro hac vice to participate in the trial or argument of a particular cause in any court in the second judicial department, or who in any way participates in an action or proceeding therein, shall be subject to this Part.

(b) The imposition of discipline pursuant to this Part shall not preclude the imposition of any further or additional

sanctions prescribed or authorized by law, and nothing contained in this Part shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit bar associations from censuring, suspending or expelling their members from membership in the association or from admonishing attorneys in minor matters: provided, however, that such action by a bar association shall be reported to the appropriate committee appointed pursuant to section 691.4 (a) of this Part and provided further, that such action by a bar association shall not be a bar to the taking of other and different disciplinary action by this court or by a committee appointed pursuant to section 691.4(a) of this Part.

Section 691.2 PROFESSIONAL MISCONDUCT DEFINED

Any attorney who fails to conduct himself, either professionally or personally,

in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, as amended to May 1, 1978, or any canon of the Canons of Professional Ethics, as adopted by such bar association, or any of the special rules concerning court decorum shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law.

SECTION 691.4 APPOINTMENT OF GRIEVANCE COMMITTEES; COMMENCEMENT OF INVESTIGATION OF ATTORNEY MISCONDUCT; COMPLAINTS; PROCEDURE

(a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty

and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

(b)(1) Each grievance committee shall consist of nineteen members and a chairman, all of whom shall be appointed by this court and sixteen of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee. Appointments of attorney members may be made from lists of prospective members submitted by the following county bar associations within the second judicial department: Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County, New York Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association, Rockland County Bar Association,Inc., Suffolk County Bar Association and Westchester County Bar Association. This court shall, in consultation with the committees,appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as it deems necessary.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. Thereafter, yearly appointments of five persons shall be made to each such committee for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his second such term.

(3) The members of the joint bar association grievance committees, as volunteers, are expressly authorized to participate in a state-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law.

(c) Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may be commenced sua sponte by this

court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) Upon receipt or initiation of a specific complaint of professional misconduct any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investiga-

tion, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than twenty days shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommitte shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent

might be made, it shall not be necessary for the committee to prepare and serve an additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of cau-

tion may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall be filed with this court along with any majority report and the written report of the subcommittee. upon such filing the committee shall await the determination of this Court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.

(k) Disciplinary proceedings shall be granted a preference by this court.

CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102

29 McKinney's Cons.L.,N.Y.,Appendix,pp.513-4:

DR 9-102. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT [1]

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client in which event the disputed portion shall not be withdrawn until the dispute

is finally resolved.

1. "Rule 9.... A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company... in a bank account separate from his own account and clearly designated as 'Clients' Funds Account' or 'Trust Funds Account' or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank or trust company... which safe deposit box shall be clearly designated as 'Clients' Account' or 'Trust Account' or words of similar import, and be separate from the attorney's own safe deposit box." Cal.Bus. & Prof. Code Sec.6076(West 1962).

"(C)ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors... The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." Black v. State Bar, 57 Cal. 2d 219, 225-26, 368 P. 2d 118, 122, 18 Cal. Rptr. 518, 522 (1962).

DR 7-101 CODE OF PROFESSIONAL RESPONSIBILITY
29 McKinney's Cons. Laws, N.Y. Jud. Law, Appendix, p. 486;

REPRESENTING A CLIENT ZEALOUSLY

...

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

DR 6-101 Code of Professional Responsibility

29 McKinney's Cons. Laws, N.Y. Jud. Law, Appendix p.465 :

DR6-101. Failing to Act Competantly

(A) A Lawyer shall not :

...

(3) Neglect a legal matter entrusted to him.

PORTIONS OF TRIAL TRANSCRIPT OF DISCIPLINARY PROCEEDING

MARY SANTORA, Purchaser:

.....

"Q. You relied on your lawyer, didn't you ... in regard to this transaction...?

A. Of course, he was my lawyer. I still do." (T 86-87).

.....

"Q. And you know what the word 'escrow' means, do you not?

A. Yes.

Q. And you know what the significance of the word 'escrow' is, don't you?

A. Yes." (T. 57).

.....

"Q. Did your husband talk to you about this matter the night of June 29, 1971?

A. I guess we talked some about it.

Q. And did you show him the check which is marked herein, I think petition-

er's Exhibit 2? (Rocco Santora escrow check). You showed him that check that you got back from me?

A. Right.

Q. And you told him you had given Mr. Sutton a non-escrow check, is that right?

A. Right.

Q. A non-escrow check, that check was given without escrow and was paid to me, is that right?

A. Right." (T. 70).

.....

"Q. You knew it was a non-escrow check?

A. Yes." (T. 60).

MARVIN E. KOROBOW, purchasers' attorney:

"Q. Subsequent to entering into the contract on June 25, 1971 and (up to) June 29, 1971, did you have any conversation with your client, the Santoras, regarding

their taking possession of such premises?

A. They asked me - the answer is yes." (T. 162).

.....

"Q. You had conversations with Mr. or Mrs. Santora in regard to their going into possession, after June 25, 1971?

A. Yes, sir.

Q. How many conversations, do you recall?

A. I don't recall.

Q. More than one?

A. I don't recall" (T. 204).

.....

"'Q. Now you have testified that you had several conversations or a number of conversations, subsequent to June 25, 1971, within a short time after June 25, 1971, which covered the subjects of termite inspection, mortgage application, and the possession of 30 Violet Road by the Santoras?

PORTIONS OF TRIAL TRANSCRIPT OF
DISCIPLINARY PROCEEDING (continued)

Q. ... Was that question put to you and did you give that answer?

A. I don't remember (T. 489).

.....

Q. How many conversations do you recall?

A. I don't recall.

Q. More than one?

A. I don't recall.

The Court (The Referee): He says he doesn't recall.

Q. That's between June 25 and June 29?

A. Within a few days after the contract was signed (T. 204).

.....

The Referee: Do you recollect?

The Witness (Korobow): I don't recall now.

Q. Do you claim to have recalled on June 19,1978,the last time you were here?

A. I don't remember if I recalled on July 19th--

The Referee: He answered 'No'" (T. 487-488).

.....

"Q. You say here that you don't recollect any conversations between June 25 and June 29 with me, is that your testimony?

A. That's correct. That was seven years ago (T. 198).

.....

Mr. Sutton: Very well, I will ask him whether he had conversation .... whether he asked me for permission --

The Referee: Did you ask him for permission?

The Witness: I don't remember.

.....

The Referee: You want to ask him whether he had any conversations with

you about permitting---

Mr. Sutton: Santoras to go into possession---

The Referee: His answer is he doesn't remember." (T. 561-562).

APPELLANT CHARLES SUTTON:

"Q. Did you ever receive any monies in escrow as a result of this transaction?

A. No, I did not." (T. 286).

LETTER DATED SEPTEMBER 24, 1971 IN EVIDENCE, FROM PURCHASERS' ATTORNEY, ANTICIPATORILY BREACHING THE CONTRACT OF SALE DATED JUNE 25, 1971

" September 24, 1971

Charles Sutton, Esq.
50 Court Street
Brooklyn, New York

Re: Santora

Dear Mr. Sutton:

I have been advised by my clients, Mr. & Mrs. Santora that because of difficulties in connection with the premises and following our meeting with you in my office discussing them, they no longer with to go further with the purchase of the house.

It would be appreciated if you would return to us the $1500.00 paid to you in accordance with a previous agreement, plus $144.16 for installation of windows (copy of bill is enclosed) and $10.00 for a new lock on the rear door, making a total of $1,654.16.

Please have the check made payable to

our firm, as attorneys, and upon receipt of said check, all obligations on the part of both parties will close and terminate.

Thanking you for your courtesies in this matter, I remain

Cordially yours,

NAGER, KOROBOW & GILBERT

George Nager

GN:GKA

Enc.

cc: Mr. & Mrs. R. Santora "

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY

77 S. Wacker Dr., 6th Floor,
Chicago, Illinois 60606

Telephone 621-9250 or 9251

July 9, 1980

Mr. Charles Sutton
299 Broadway
New York, New York 10007

Dear Mr. Sutton:

In response to your telephone conversation of June 26, 1980 with Robin Alexander-Smith of our office I hope you find the following information relating to DR 9-102 helpful.

Forty-one states and the District of Columbia have provisions in their codes of professional responsibility which are identical to DR 9-102 of the ABA's Model Code of Professional responsibility. There are nine states which have adopted codes of professional responsibility which differ in some respect with DR 9-102 of the ABA's Model Code of Professional Responsibility.

Alabama:
DR 9-102

The corresponding provision is identical to the Model Code through provision DR 9-102(B)(3). The Alabama rule then proceeds as follows:

(4) Not misappropriate the funds of his client, either by failing promptly to pay over money collected by him for his client or by appropriating to his own use funds entrusted to his keeping.

(C) Funds received directly or indirectly under an approved credit card plan shall be subject to all of the requirements of this disciplinary rule.

California:
Rule 8-101

The state's corresponding provision differs substantially from the ABA Code. The rule is as follows:

Rule 8-101 Preserving Identity of Funds and Property of a Client.

(A) All funds received or held for

the benefit of clients by a member of the State Bar or firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account", "Client's Funds Account" or words of similar import, maintained in the State of California, or with written consent of the client, in such other jurisdiction where there is a substantial relationship between his client or his client's business and the other jurisdiction and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited

therein and the portion belonging to the member of the State Bar or firm of which he is a member must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member of the State Bar shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

AMERICAN BAR ASSOCIATION letter (cont'd.)

(3) Maintain complete records of all funds, securities and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive.

Florida
DR 9-102

This state's rule is identical to the ABA's rule except that Florida has an additional provision as follows:

(C) Funds received directly or indirectly under an approved credit plan shall be subject to all of the requirements of this disciplinary rule.

Georgia

The corresponding provisions are as

follows:

Standard 61.

A lawyer shall promptly notify a client of the receipt of his funds, securities or other properties and shall promptly deliver such funds, securities or other properties to the client. A violation of this standard may be punished by disbarment.

Standard 62.

A lawyer shall identify and label funds, securities and other properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable. A violation of this standard may be punished by disbarment.

Standard 63.

A lawyer shall maintain complete records of all funds, securities and other properties of a client coming into the

possession of the lawyer and promptly render appropriate accounts to his client regarding them. A violation of this standard may be punished by disbarment.

Standard 64.

A lawyer shall not fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him as a lawyer within ten (10) days after the time appointed in the order of judgment. In such cases the record of the judgment is conclusive evidence unless obtained without valid service of process. A violation of this standard may be punished by disbarment.

Standard 65.

A lawyer shall not commingle his client's funds with his own and shall not fail to account for trust property, including money and interest paid on the client's money, if any, held in any fiduciary capacity. A violation of this

standard may be punished by disbarment.

Illinois
Rule 9-102

This state's rule begins as follows:

(a) Other than advances for costs and expenses, all funds of clients paid to a lawyer or law firm, including funds belonging in part to a client and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more separate identifiable trust bank accounts maintained in the State in which the law office is situated.

(b) The portion of funds deposited in accounts described in Rule 9-102(a) belonging to the lawyer or law firm may be withdrawn when due, after reasonable notice to the client of an intention to withdraw, unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the

dispute is finally resolved.

The Illinois provision (c) concludes its Rule DR 9-102 and is identical to ABA Model Code DR 9-102(B)(1) through (4).

Hawaii
DR 9-102

This provision is identical to the ABA Model Code except that the rule specifies "All funds of clients paid to a lawyer or law firm in the State of Hawaii... bank accounts maintained in the State of Hawaii".

Maine
Rule 3.6

The text of this rule is identical to the ABA Model Code except for method of paragraph designation.

(f) Preserving identity of Funds and Property

(1) corresponds to ABA (A)

(i) corresponds to ABA (1)

(ii) corresponds to ABA (2)

(2) corresponds to ABA (B)

(i) corresponds to ABA (1)

(ii) corresponds to ABA (2)

(iii) corresponds to ABA (3)

(iv) corresponds to ABA (4)

Massachusetts
DR 9-102

This rule differs from the ABA Rule only in (B)(3) which provides as follows:

Maintain complete records of the handling, maintenance and disposition of all funds, securities and other properties of a client coming into the possession of the lawyer from the time of final distribution; preserve such records for a period of ten years after final distribution of such funds, securities or other properties; and render appropriate accounts to the client regarding them.

New Jersey
DR 9-102

This state's provision includes the phrase "in this State" in its initial paragraph (A) as well as the phrase "and all escrow funds" which follows the exempt-

ive phrase "other than advances for costs and expenses." In addition, New Jersey has a provision (C) which reads:

(C) A lawyer shall comply with the provisions of R.1:21-6 (Record Keeping) of the Rules Governing the Courts of the State of New Jersey.

If I can be of any further assistance please do not hesitate to contact me.

Very truly yours,

Laurie S. Pocius
Legal Assistant

LSP/had
3490F

The Various Standards of Proof
in the state and federal courts

Cases from the Fourth, Seventh, Eighth and District of Columbia Courts of Appeal and from the United States District Court for the Southern District of New York were found and show that all required a standard of proof in an attorney disciplinary proceeding greater than "preponderance of the evidence", namely, "clear and convincing evidence", or "convincing" evidence, or "preponderance of satisfactory evidence ... clear and free from doubt", or "clear case", to wit:

Fourth Circuit: In re Ryder, 263 F. Supp. 360 (E.D. Va. 1967), aff'd. 381 F. 2d 713 (4th Cir. 1967): "clear and convincing proof". Seventh Circuit: In re Fisher, 179 F. 2d 361 (7th Cir.), cert. den. sub. nom. Kerner v. Fisher, 340 U.S. 825 (1950); "clear and convincing proof." Eighth Circuit: Hertz v. United States, 18 F. 2d 52, 54 (8th Cir. 1927): "clear

case", citing Ex parte Wall, 107 U.S. 265, 288. District of Columbia Circuit: Charlton v. F.T.C., 543 F. 2d 903, 907-909 (D.C. Cir. 1976): "preponderance of satisfactory evidence. The case should be clear and free from doubt." District Court for Southern District of New York: In re Gladstone, 28 F. Supp. 858 (D.C.N.Y. 1939): "convincing proof."

The majority of the states, namely, thirty-four (34) states out of a total of forty-four (44) states which have reported cases on the issue, require a standard of proof in attorney disciplinary proceedings greater than a preponderance of the evidence. Ten (10) states apply a standard of proof of preponderance of the evidence. Six (6) states were not found to have any reported case on this issue. One state announces that the standard of proof is "beyond a reasonable doubt", to wit:

The Various Standards of Proof in the state and federal courts (continued)

Georgia: Cushway v. State Bar, 170 S.E. 2d 732, 120 Ga. App. 371, cert. den. 398 U.S. 910, reh. den. 399 U. 938 (1969).

One state in practice applies the standard of "beyond a reasonable doubt" even though its declared standard is "reasonable preponderance of the evidence":

Kentucky: Kentucky Bar Ass'n. v. Franklin, 534 S.W. 2d 459, 463 (1976); Louisville Bar Ass'n. v. Hubbard, 139 S.W. 2d 773, 777 (1940).

One state applies the standard of "preponderance of evidence", but adds that the evidence must be "clear and free from doubt", to wit:

Vermont: In re Wright, 310 A. 2d 1, 9-10 (1973).

Two states apply the standard of proof of "clear and convincing evidence", but add that the evidence must be "free from doubt", to wit:

The Various Standards of Proof in the state and federal courts (continued)

Colorado: People v. Denious, 1 96 P. 2d 257, 264 (1948);

Illinois: In re Smith, 365 Ill. 11, 5 N.E. 2d 227, 229-230 (1936).

One (1) state applies the standard of proof of "clear and convincing evidence", but adds that the evidence must be "sufficient to sustain a charge to a reasonable certainty":

California: McComb v. Com. on Ind. Perf., 564 P. 2d 1, 6-7 (1977); Hildebrand v. State Bar of California, 117 P. 2d 860, 869 (1941).

One state applies the standard of "clear and convincing evidence", but adds that "any reasonable doubt will be resolved in favor of the accused", to wit:

Hawaii: Disciplinary Bd. of Hawaii Sup. Ct. v. Kim, 583 P. 2d 333, 335 (1978).

One state applies the standard that the "proof must satisfy the court with

reasonable certainty ... the evidence must not leave the fact in a state of doubt and uncertainty":

Alabama: Ex parte Acton, 283 Ala. 121 (1968); In re Carroll, 247 So. 2d 350, 355-356 (1971).

Twenty-three (23) states apply the standard of proof of "clear and convincing evidence" or equivalent:

Arizona: Matter of Moore, 110 Ariz. 312, 518 P. 2d 562, 563 (1974).

California: Hildebrand v. State Bar of Calif., 117 P. 2d 860, 869 (1941).

Colorado: People v. Denious, 196 P. 2d 264 (1948).

Florida: The Florida Bar v. Rayman, 238 So. 2d 594, 596-598 (1970).

Hawaii: Disciplinary Bd. of Hawaii Sup. Ct. v. Kim, 583 P. 2d 333, 335 (1978).

Illinois: In re Smith, 365 Ill. 11, 5 N.E. 2d 227, 229-230 (1936).

The Various Standards of Proof in the state and federal courts (continued)

Kansas: State v. Johnson, 546 P. 2d 1320 (1976).

Louisiana: Louisiana State Bar Assn. v. Edwins, 329 So. 2d 437, 441-442 (1976).

Maryland: Attorney Griev. Comm. v. Bailey, 403 A. 2d 1261, 1268 (1979). In re Ruby, 105 N.E. 2d 234 (1952).

Minnesota: In re Palarine, 19 N.W. 2d 439, 446 (1945).

Montana: State v. Lympus, 410 P. 2d 445, 446 (1966).

Mississippi: In re Quinn's Disbarment, 78 So. 2d 883, 884 (1955).

Nebraska: State v. Nielsen, 136 N.W. 2d 355, 360 (1965).

New Hampshire: De Cato's Case, 379 A. 2d 825 (1977).

New Jersey: Matter of Sears, 364 A. 2d 777, 788-789 (1976).

New Mexico: In re Martin, 354 P. 2d 995, 998 (1960).

The Various Standards of Proof in the state and federal courts (continued)

Nevada: Copren v. State Bar, 183 P. 2d 833, 840 (1947).

Oregon: In re Complaint of Rook, 556 P. 2d 1351, 1355 (1976).

Rhode Island: Carter v. Walsh, 406 A. 2d 263, 265 (1979).

South Carolina: In re Friday, 208 S.E. 535, 537 (1974).

Utah: In re McCullough, 95 P. 2d 13, 17-18 (1939).

Virginia: Tenth Dist. Com. of Virginia State Bar v. Baum, 193 S.E. 2d 698, 703-704 (1973).

Wisconsin: State v. Wildermuth, 251 N.W. 2d 779 (1977): "clear and satisfactory".

Eight (8) states apply a standard of proof higher than "preponderance of evidence", namely, "clear preponderance of the evidence", or "clear and undoubted preponderance", or "full, clear and pre-

ponderating evidence", and "convincing preponderance of the evidence", and the like, to wit:

Delaware: In re Bennethum, 162 A. 2d 429 (1960).

Idaho: In re Campbell, 50 P. 2d 1100 1972).

Iowa: Comm. v. Rabe, 284 N.W. 2d 234 (1979).

Pennsylvania: In re Shigon, 329 A.2d 235, 243 (1974).

South Dakota: In re Jacquith, 117 N.W. 2d 97, 98 (1962).

Vermont: In re Wright, 310 A. 2d 1, 9-10 (1973).

Washington: In re Little, 244 P. 2d 255, 260 (1952).

West Virginia: Com. on Legal Ethics of West Virginia v. Daniel, 235 S.E. 2d 369, 372 (1977).

Ten (10) states apply a standard of proof of preponderance of evidence, to wit:

The Various Standards of Proof in the state and federal courts (continued)

Alaska: Matter of Robson, 575 P. 2d 771, 776 (1978).

Arkansas: Weems v. Sup. Ct. etc., 523 S.W. 2d 900 (1975).

Indiana: In re Lockyear, 305 N.E. 2d 440, 447 (1974).

Massachusetts: In re Mayberry, 3 N.E. 2d 248 (1936); In re Ruby, 105 N.E. 2d 234 (1952).

Michigan: In re Posler, 213 N.W. 2d 133 (1973).

Missouri: Matter of Bear, 578 S.W. 2d 928 (1979).

New York: Feola v. N.Y. State Bar Assn., 37 A.D. 2d 789, 324 N.Y.S. 2d 654 (3rd Dept. 1972).

Ohio: In re Leiberman, 125 N.E. 2d 328 (1955); Cleveland Bar Assoc. v. Fleck, 178 N.W. 2d 782, 784 (1961).

Oklahoma: Appl. of Balch, 506 P. 2d 1384, 1386 (1973).

Texas: Drake v. State, 488 S.W. 2d 534 (1972).

Of these ten (10) states, seven (7) states were found to have previously required a higher standard of proof, to wit:

Alaska: Prior to the adoption of the Bar Rule recommended by the Alaska Bar Association, case law required a standard of proof of "clear and convincing evidence": In re Hanson, 532 P. 2d at 308.

Michigan: In re Posler, 213 N.W. 2d 133 (1973): "clear and convincing".

Missouri: Prior cases required "clear case as upon clear legal proof": In re Williams, 128 S.W. 2d 1098 (1939).

New York: In New York, prior to In re Ruffalo, supra, the New York Court of Appeals in Matter of Kelly, 59 N.Y. 595, 596 (1874) and Matter of an Attorney, 83 N.Y. 166 (1880) held that an attorney disciplinary proceeding was "public and quasi-

criminal". Consistent with those decisions, the New York Appellate Division, First Department, in In re Mashbir, 44 App. Div. 632, 60 N.Y.S. 451 (1st Dept. 1899) held that in an attorney disciplinary proceeding the standard of proof must be "beyond a reasonable doubt"; and in Matter of an Attorney, 1 Hun. 321 (1874): "...the matter was penal and should be free from serious doubt." In the New York Appellate Division, Second Department, In re Post, 7 N.Y.S. 438 (1889), the court required "full proof in justification of the exercise of their summary powers to suspend or disbar an attorney." These cases have not been overruled. But they were not followed. In Matter of Feola, 37 A.D. 2d 789 (3rd Dept. 1971) the standard of proof was held to be "preponderance of evidence" and that it was a civil proceeding. In In re an Attorney, 175 App. Div. 653, 161 N.Y.S. 504, 508

(3rd Dept. 1916) that same Third Department held that the standard of proof was "clear and satisfactory and convincing. The respondent is presumed to be innocent and proof of his guilt should be clearly established." That case has never been overruled; nonetheless it was not followed in this proceeding. The New York Court of Appeals in In re Kaufman, 245 N.Y. 423, 432 (1927) stated that the guilt of an attorney in a disciplinary proceeding must be proved by evidence "so convincingly as to satisfy the conscience".

Ohio: Older cases not specifically overruled, required a standard of proof of "beyond a reasonable doubt": Matter of Lundy, 8 Ohio Civ. Cts. 111 (1897).

Oklahoma: Prior cases required "clear and convincing testimony...free from doubt". In re Hadwiger, 27 P. 2d 604, 610 (1933).

Texas: In Drake v. State, 488 S.W. 2d

534, 536 (1972) Texas specifically rejected the Supreme Court's holding in In re Ruffalo, supra, as "dictum", and stated that while in a prior case, State v. Tunstall, 51 Tex. 81 (1879) it was held to be "quasi-criminal", a later case, Scott v. State, 86 Tex. 321, 24 S.W. 789 (1894) overruled Tunstall and held the proceeding to be a civil case.

Six (6) states were not found to have any reported case on this issue, to wit:

Connecticut, Maine, North Carolina, North Dakota, Tennessee and Wyoming.

No. 80-313

Supreme Court, U. S.
FILED
SEP 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES SUTTON,

Appellant,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

On Appeal from the Court of Appeals of the State of New York

and

On Appeal from the Appellate Division, Second Department of the Supreme Court of the State of New York

---

MOTION TO DISMISS APPEAL

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Statute Cited

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Other Authority Cited

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No. 80-313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES SUTTON,

Appellant,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

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On Appeal from the Court of Appeals of the State of New York

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MOTION TO DISMISS APPEAL

Preliminary Statement

Respondent, Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts' motion is submitted to dismiss the appeal of appellant, Charles Sutton, purportedly taken pursuant to 28 USC §1257(2), for want of a substantial federal question.

Appellant served his jurisdictional statement on repondent on August 29, 1980.

The appeal which involves an attorney disciplinary proceeding, was taken from an order of the Appellate Division, Second Department of the Supreme Court of the State of New York, dated and entered November 13, 1979, which suspended appellant from the practice of law for three years (*Matter of Sutton,* 70 AD 2d 467 [1979 2nd Dept.]) and from the orders of the Court of Appeals of the State of New York, dated and entered February 7, 1980, dismissing his appeal, *Matter of Sutton,* 49 N.Y. 2d 799 and the order dated and entered April 1, 1980, *Matter of Sutton,* 49 N.Y. 2d 918, denying reargument and leave to appeal and the order dated and entered May 29, 1980, denying reargument of the motion for leave to appeal. *Matter of Sutton,* —— N.Y. 2d ——.

Jurisdiction

This motion to dismiss is brought in accordance with Rule 16(b) of the U. S. Supreme Court Rules (28 USCA, Supreme Court Rules, Rule 16(b).

Statement of the Case

Appellant, Charles Sutton was admitted to practice as an attorney and counsellor-at-law, by the Appellate Division, Second Department of the Supreme Court of the State of New York in 1952. By order of the latter court, dated and filed on April 25, 1977, respondent, Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts was authorized to prosecute a disciplinary proceeding against appellant, Charles Sutton.

After lengthy hearings, in which appellant, Charles Sutton and his counsel each took turns cross-examining and re-cross examining respondent's witnesses, the referee rendered his report. (See Appellant's Jurisdictional Statement, page 2a)

The referee had sustained in full the first of two charges of professional misconduct and the second charge, in part. The Appellate Division, Second Department (*Matter of Sutton,* 70 AD 2d 467 [1979, 2nd Dept.]) agreed in full with the referee. The Court found in suspending appellant from the practice of law for three years, that appellant had been ". . . guilty of converting to his own use, escrow funds in the amount of $1,500 from the proposed purchasers of real property without the knowledge or consent of the purchaser's attorney and neglecting a legal matter for which he had been retained, resulting in prejudice to his clients."

The referee had found in his report, which as noted above was fully sustained by the Appellate Division, the following:

Fifteen hundred dollars ($1,500) was to have been held in escrow by appellant until closing pursuant to the terms of a contract (which was marked in evidence at the hearings) entered into between the seller, Plover Builders,

Inc. and the purchasers, Rocco and Mary Santora, for the purpose of a one family house for the price of $25,500. The contract was executed on June 25, 1971.

Appellant was the sole shareholder of Plover Builders, Inc. and executed the contract on its behalf. In addition, it was undisputed that appellant acted as the attorney for the seller and at the time of contract signing, June 25, 1971, received a check in the amount of $1,500. from the purchasers for the down payment. The purchasers were represented by counsel, Marvin Korobow, Esq. at the contract signing.

The escrow check bore the legend on it, "In escrow in re premises 30 Violet Road . . .". Further, the check was made payable to the order of appellant, "as attorney".

Appellant on or about June 29, 1971 called Mrs. Mary Santora at her home and falsely advised her that her attorney had agreed to the issuance of a substitute check, telling her that he needed a certified check. Appellant then picked Mrs. Santora up at her home and took her to her bank and had her issue him a second check which he promptly cashed. Further, he instructed Mrs. Santora not to put the words "in escrow" on the check, telling her that it was unnecessary to do so. Mrs. Santora testified that she had assumed that the money was kept in escrow by appellant.

The $1,500. which was thereby converted, was never returned to the Santoras, appellant claiming that the purchasers breached the contract. The alleged breach centered around a claim by appellant that the purchasers were to procure a mortgage pursuant to a contingency provision in the contract. However, five witnesses at the hearing, namely Mr. & Mrs. Santora, their attorney and

two real estate brokers, all testified that it was appellant who was to obtain the mortgage for the purchasers. The alleged breach of contract claimed by appellant, had occurred subsequent to the switch of the checks and therefore in fact bore no relationship to appellant's conversion of the $1,500. escrow.

In any event, a civil lawsuit instituted by appellant against the Santoras at the time hearings were held by the Grievance Committee of the Brooklyn Bar Association in 1973 regarding his conduct was thereafter not pursued by him until the hearings authorized by the Appellate Division were conducted in 1978. In that action summary judgment was granted by the Supreme Court of the State of New York, Kings County in 1978 in favor of the Santoras against appellant.

The referee found in effect that appellant testified falsely when he denied under oath that he was to procure the mortgage.

Regarding Charge Two, the Zolondek Matter, the referee found that appellant had been retained by Mrs. Zolondek on behalf of her son who at six years of age was injured in or about 1957 when he fell off a mechanical hobby horse. Appellant caused process to be served in 1960. In 1964 the matter was placed on the calendar. In 1965, the case wase marked off the calendar pursuant to Rule 3404 of the Civil Practice Law and Rules of New York (Vol. 7B, McKinneys) as having been abandoned.

Appellant had told his client, Mrs. Zolondek between 1964 and 1972 in conversations they had, that the case was on the calendar.

The referee found that appellant not only neglected the case, prejudicing his client's right to revive the action if

she chose to, but misrepresented that the case was still on the calendar.

As to the De Loach matter, the referee did not sustain the charge.

POINT ONE

The appeal should be dismissed, in view of appellant's failure to establish that a substantial federal question exists.

Appellant predicates the instant appeal on the alleged unconstitutional application to him of Rule 691.4 of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department of the Supreme Court of the State of New York, (22 NYCRR 691.4).

Rule 691.4 provides as follows:

> "691.4 Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct; Complaints; Procedure
>
> (a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appel-

late Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

(b)(1) Each grievance committee shall consist of nineteen members and a chairman, all of whom shall be appointed by this court and sixteen of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee. Appointments of attorney members may be made from lists of prospective members submitted by the following county bar associations within the second judicial department; Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County, New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association and Westchester County Bar Association. This court shall, in consultation with the committees, appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as it deems necessary.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his second such term.

(3) The members of the joint bar associaton grievance committees, as volunteers, are expressly authorized to participate in a state-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law.

(c) Investigation of professional misconduct, may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may be commenced sua sponte by this court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) *serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivsion (f) of this section;*

(5) *forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts shows probable cause for such action.* (Emphasis Supplied)

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than twenty days shall be served upon the person concerned, either personally, by certified mail, or, in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenograpic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges

against the respondent might be made, it shall not be necessary for the committee to prepare and serve an additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent or recommend that probable cause exists for the filing of disciplinary charges against the rsepondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall be filed with this court along with any majority report and the written report of the subcommittee. Upon such filing the committee shall await the determination of this court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.

(k) Disciplinary proceedings shall be granted a preference by this court."

Appellant's claim is that he was not accorded a subcommittee hearing as required by the aforesaid Rule 691.4 (e)(4) and therefore suffered a deprivation of due process.

However, he has failed to point out, that in addition to the extensive hearings conducted before the referee, lengthy hearings were held by the Grievance Committee of the Brooklyn Bar Association on December 20, 1972, January 17, 1973, February 21, 1973, March 21, 1973 and May 16, 1973, regarding *inter alia,* the *Santora* complaint (Charge One of the petition referred to *supra*). At those hearings, appellant for a time appeared with counsel and then *pro se,* cross-examined witnesses and then testified on his own behalf.

The Brooklyn Bar Association hearings were conducted prior to the promulgation of the Appellate Division, Second Department of the Supreme Court of the State of New York's Rules Governing the Conduct of Attorneys, Part 691, which was put into effect in November 1974. Indeed, therefore the respondent Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts did not even come into existence (22 NYCRR 691.4) until the latter rules were enacted and subsequent to when the Brooklyn Bar Association conducted its hearings.

Part 691 gives local bar association grievance committees authority to continue the handling of complaints of professional misconduct which are "minor matters", however, the bar association grievance committees are required to forward serious matters to the Joint bar Asso-

ciation Grievance Committee (now known as the Grievance Committee for the Second and Eleventh Judicial Districts) which is an arm of the court. This division of duties of the local bar association is prescribed by §691.1 (b) of the aforesaid Rules Governing the Conduct of Attorneys.

> "PART 691—RULES GOVERNING THE CONDUCT OF ATTORNEYS
>
> §691.1 Application
>
> (a) This Part shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have offices in the second judicial department, or who are admitted to practice by a court of another jurisdiction and who regularly practice within this department as counsel for governmental agencies or a house counsel to corporations or other entities, or otherwise. In addition, any attorney from another State, territory, district or foreign country admitted pro hac vice to participate in the trial or argument of a particular cause in any court in the second judicial department, or who in any way participates in an action or proceeding therein, shall be subject to this Part.
>
> (b) The imposition of discipline pursuant to this Part shall not preclude the imposition of any further or additional sanctions prescribed or authorized by law, and nothing contained in this Part shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, *nor to prohibit bar associations from censuring, suspending or expelling*

> *their members from membership in the association or from admonishing attorneys in minor matters:* provided, however, that such action by a bar association shall be reported to the appropriate committee appointed pursuant to section 691.4 (a) of this Part and provided further, that such action by a bar association shall not be a bar to the taking of other and different disciplinary action by this court or by a committee appointed pursuant to section 691.4(a) of this Part." (Emphasis Supplied)

Accordingly, this serious matter which involved an allegation of conversion of escrow funds (Santora matter) was forwarded by the Brooklyn Bar Association to the Joint Bar Association Grievance Committee Second and Eleventh Judicial Districts in or about 1975. Appellant was therefore given the equivalent of a subcommittee hearing, (§691.4 (e)(4)) prior to the effective date of Part 691 as well as the hearing before the referee.

The subcommittee hearing is used by the Joint Bar Association Grievance Committee as an investigatory tool. Thus, his claim of a denial of due process is absurd and the appeal should be dismissed for want of a substantial federal question. *Friedman* v. *Court on Judiciary of the State of New York,* 375 U.S. 10 (1963).

The prompt action provision under §691.4 (e)(5) (*supra*) serves the purpose of avoiding additional delay in the conduct of the disciplinary proceeding where the public interest demands that expeditiousness is required and probable cause exists, such as where there is an allegation that escrow funds have been converted. Therefore, in those instances one hearing is conducted before a referee rather than holding an additional investigatory subcommittee

hearing before the Joint Bar Association Grievance Committee.

Finally, Part 691 is not a statute but merely a rule of the Appellate Division. Section 1257(2) (28 USCA) on which appellant bases his appeal, requires that the validity of a statute be called into question, not the mere rule of a Court.

POINT TWO

Appellant has raised collateral issues which are also lacking in merit.

He alludes to *Addington* v. *Texas,* —— U.S. —— 99 S.Ct. 1804 (1979) for the purported proposition that a higher quantum of proof than a fair preponderance of the evidence should have been applied in his attorney disciplinary proceeding. *Addington,* decided by this Court, has little if any relevance to attorney disciplinary proceedings, since it involved a civil involuntary commitment proceeding in which this Court held that a clear and convincing standard must be applied.

This Court specifically stated in *Addington,* that,

> "We have concluded that the reasonable doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term 'unequivocal' is not constitutionally required although the states are free to use that standard. To meet due process demands, *the standard has to inform the fact finder that the proof must be greater than the preponderance of the*

evidence standard applicable to other categories of civil cases." (Emphasis Supplied)

It has long been held in New York, that attorney disciplinary proceedings are civil in nature and not criminal or quasi-criminal. *Matter of Zuckerman,* 20 N.Y. 2d 430, 438 (1967), *cert. den.* 390 U.S. 925 (1968) See also, *Matter of Anonymous,* 41 N.Y. 2d 506 (1977) and *Matter of Randel,* 158 N.Y. 216 (1899).

Additionally, the standard of proof in disciplinary proceedings in New York is as described above, by a fair preponderance of the credible evidence. *Matter of Phillies,* 17 A.D. 2d 93, 99 (4th Dept., 1962) *Mtn for lv. to app. to Ct. of App. den.* 12 N.Y. 2d 645, *Matter of Feola,* 37 A.D. 2d 789 (3rd Dept., 1971) and *Matter of Mogel,* 18 A.D. 2d 203, 204 (1st Dept., 1963).

The record as described in the Statement of the Case above, reflects that the evidence adduced at the hearings was more than sufficient basis on which the charges were sustained, contrary to appellant's contention.

Concerning the Zolondek matter, the referee's finding that appellant had not only been guilty of neglect but misrepresentation, clearly does not amount to a deprivation of due process, since it wasn't only charged in the petition that appellant neglected the interests of his client, but that he permitted the case to be marked off the calendar and despite numerous calls from his client and meetings with her in which she inquired into the status of the case, he failed to apprise her that the case had been dismissed.

The specific allegation in the petition provided,

"Charge Two

B. Respondent has been guilty of neglecting legal matters entrusted to him and of failing to respond to the legitimate inquires of his clients as follows:

1. Respondent was retained by William and Florence Zolondek in or about 1957 to prosecute an action for personal injuries sustained in a fall by their son, Martin Zolondek who was six years of age at the time of the accident which occurred on April 19, 1957.

An action was commenced by the respondent on behalf of the Zolondeks in Supreme Court, Kings County. Issue was joined on August 7, 1961. A note of issue was filed by the respondent on July 6, 1964 with the Supreme Court of the State of New York, Kings County. Thereafter:

(a) Respondent grossly neglected the interests of his clients in that he permitted the case to be marked off the calendar and dismissed;

(b) *Despite numerous calls and meetings at which the Zolondeks appeared at respondent's office, and inquired as to the status of their lawsuit, he has failed to apprise his clients that the matter has been dismissed."* (Emphasis Supplied)

The finding of misrepresentation therefore was implicit in the charge, even though that specific word was not used. Thus, appellant's claim is meritless.

CONCLUSION

The alleged jurisdictional basis for this appeal pursuant to §1257(2) (28 USCA 1257 (2)) has not been established in the case at bar, since a substantial federal question does not exist. Further, Section 691.4 (e) of the Rules Governing the Conduct of Attorneys of the Appellate Division Second Department (22 NYCRR 691.4 (e)) is just that, a rule and not a statute as described in §1257 (2). Moreover, the other collateral claims by appellant, in which he does not assert jurisdiction for this appeal, are without basis.

Hence, the appeal should be dismissed.

Dated: Brooklyn, New York
Setember 26, 1980

Respectfully submitted,

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Of Counsel

Supreme Court, U.S.
FILED
OCT 7 1980
MICHAEL RODAK, JR., CLERK

Docket Number 80-313

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

- -X

CHARLES SUTTON, :

Appellant, :

v. :

JOINT BAR ASSOCIATION GRIEVANCE :
COMMITTEE FOR THE SECOND AND
ELEVENTH JUDICIAL DISTRICTS, :

Appellee. :

:

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK AND :

ON APPEAL FROM THE APPELLATE DIVISION, :
SECOND DEPARTMENT OF THE SUPREME COURT
OF THE STATE OF NEW YORK :

- -X

APPELLANT'S OPPOSITION
TO MOTION TO DISMISS

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Dated: October 6, 1980

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Statement

This appeal presents five substantial federal questions, each of which would justify plenary consideration by this Court, to wit: (1) the invalidity of Rule 691.4 as applied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) the invalidity of Rule 691.4(e)(5) on its face and as applied, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the impermissibility under the Due Process Clause of the Fourteenth Amendment of the use of the lowest civil monetary issue private action standard of proof of preponderance of the evidence to try and convict appellant in the public, highly penal, quasi-criminal attorney disciplinary proceedings involving and threatening the loss of appellant's most fundamental constitutional interests at stake of "liberty" and "property"; (4) the invalidity under the Due Process Clause of the Fourteenth Amendment of

the conviction of the appellant upon a charge not made and not tried in violation of the Due Process Clause of the Fourteenth Amendment; and (5) the conviction of appellant of professional misconduct without evidence and upon insufficient evidence in violation of the Due Process Clause of the Fourteenth Amendment.

Page restrictions require that this response be limited to the first four issues and reference in all respects is made to the appellant's Jurisdictional Statement.

Point I. Rule 691.4 is a statute under 28 U.S.C. Section 1257(2) and this appeal as of right is properly before this Court.

Appellee argues at Motion at pp. 14,17 that 28 U.S.C. Section 1257(2) is not applicable because it is not a statute. A rule of court is a "statute" within the meaning of 28 U.S.C. Section 1257(2). In re Griffiths, 413 U.S. 717 (1973); Mayer v. City of Chicago, 404 U.S. 189 (1971); Marcus v. Search Warrant, 367 U.S. 717 (1961); Williams v. Bruffy, 96 U.S. 176 (1877); Stern & Gressman, Supreme Court Practice, p.162 (5th Ed. 1978).

Point II.	Rule 691.4 is unconstitutional as applied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.
Point IIA.	Rule 691.4(e)(5) is unconstitutional on its face and as applied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The appellee's motion to dismiss this appeal summarily cannot be justified in the light of the appellee's own construction and explanation of Rule 691.4(e)(5), set forth at Motion, pp. 13-14, to wit:

> "The prompt action provisions under section 691.4(e)(5)(supra) serves the purpose of avoiding additional delay in the conduct of the disciplinary proceeding where the public interest demands that expeditiousness is required and probable cause exists, such as where there is an allegation that escrow funds have been converted. Therefore, in those instances one hearing is conducted before a referee rather than holding an additional investigatory subcommittee hearing before the Joint Bar Association Grievance Committee",

which demonstrates the unconstitutionality of Rule 691.4(e)(5) on its face and as

applied in violation of the Due Process and Equal Protection Clauses of the 14th Amendment. Appellee shows that the grant or denial by appellee of notice and opportunity to be heard to appellant, or to any attorney, depends on no statutory standard and no standard at all, but on what the appellee may subjectively and arbitrarily decide, on an ad hoc basis, whether the "public interest" demands "expeditiousness" and depends on the appellee's arbitrary and subjective view of the allegations of the charges. By appellee's own explanation, Rule 691.4(e)(5) is applied unequally and with a special animus against attorneys arbitrarily selected by the appellee and does not apply and is not construed by appellee to apply equally, impartially, and even-handedly to all attorneys subjected to charges, in violation of the Equal Protection Clause of the 14th Amendment. F.S. Royster Guano Co. v. Vir-

ginia, 253 U.S. 412, 415 (1920); Yick Wo v. Hopkins, 118 U.S. 356 (1886); N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 587-588, 592 (1979) and Ibid., at 609, (White, J.) (Dissent); San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 89(1973) (Marshall, J., dissenting).

There would be no question whatever of the invalidity of a criminal statute which allowed a prosecutor or any governmental authority to decide to deny an accused any of the substantive and procedural rights due to every other person accused of crime, that is, "less substantive and procedural protection", simply because of the allegations made, or the nature of the crime charged, Jackson v. Indiana, 406 U.S. 715, 723-724 (1972); Vitek v. Jones, ___U.S. ____, 63 L.Ed. 2d 552, 100 S. Ct.1254(1980), or whether "public interest" demanded "prompt action"; Shelton v. Tucker, 364 U.S. 479, 488 (1960); Jackson v. Indiana, supra; Vitek v. Jones, supra; Kennedy v. Mendoza-Martinez, 372 U.S.144,165 (1963).

The constitutionality of Rule 691.4 and Rule 691.4(e)(5) is subject to the standard of strict judicial review since

the appellant's interests which are impinged upon are his fundamental constitutional rights of "liberty" and "property" (J.S. 25-27). Dunn v. Blumstein, 405 U.S. 330, 336-338 (1972). As shown in the Jurisdictional Statement, pp. 28-29, the appellee was created for the very purpose to conduct the first stage proceedings in accordance to Rule 691.4(e)(1-4),(f),(g), and (h), and so appellee has no interest to deny appellant those statutory rights.

Appellee's argument at Motion pp. 13-15 is frivolous not only because the Grievance Committee of the Brooklyn Bar Association is an entirely different body from the appellee, Shaw v. The Hospital Authority of Cobb County, 507 F. 2d 625, 628 (5th Cir. 1975), and was held more than 4 years before the existence of these charges, and at least one year prior to the existence of the appellee, but also because the com-

plaint by the Santoras in December, 1972 ... to the Brooklyn Bar Association, was a request for 'help to get back' the contract down payment forfeited by them by their breach of contract and did not make any of the charges alleged in this case. Further there was never any hearing of any kind by any body as to Zolondek and De Loach.

As clearly shown at J.S. 24, 25, 28-29, 34, and from the face of Rule 691.4 and in particular Rule 691.4(e)(1-4), (f), (g) and (h), the appellee is an accusatory, prosecutorial and adjudicatory quasi-judicial body exercising a judicial function.

Appellee's motion to dismiss cannot be justified also in the light that the decision below is in conflict with the decisions of this Court that

> "'Wherever one is assailed in his person or property there he may defend'. Windsor v. McVeigh, 93 U.S. 274, 277, 23 L.Ed. 914 (1896). See, Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531 (1864); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L. Ed. 215 (1897)," Boddie v. Connecti-

cut, 401 U.S. 371, 377 (1971), and cases cited at J.S. 25,

and that the right to notice and opportunity to be heard "before he is deprived of a significant property interest" is a "root requirement" of due process, Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971), that this right is as fundamental a constitutional right as the constitutional right to religious freedom, free speech or assembly, Boddie v. Connecticut, 401 U.S. 371, 379-380 (1971), that these principles have "remained relatively immutable in our jurisdiction", Greene v. McElroy, 360 U.S. 474, 496-497 (1969), and that secret, ex parte proceedings involving "secret, one-sided determination of facts decisive of rights" are constitutionally impermissible, Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170-171 (1951)(Frankfurter, J., concurring),and in the light of the square conflict of the decision below with the decisions of this

Court that the rule

> "should be interpreted...so as to observe due process in its basic meaning". Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 165 (1951)(Frankfurter, J., concurring); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123 (1926); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-106 (1963); Gonzales v. United States, 348 U.S. 407, 410-412 (1955); Morgan v. United States, 304 U.S. 1, 19 (1938);

and in the light of the square conflict of the decision below with the decisions of this Court requiring that an agency must obey its own rules, United States v. Nixon, 418 U.S. 683, 694-696 (1974); Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954), and cases cited in J.S. 32-33,

and in the light of the conflict of the decision below with the decisions of this Court requiring notice and opportunity to be heard to be accorded at both the first stage and the second stage of a proceeding, Ward v. Monroville, 409 U.S. 57, 61-62 (1973), and cases cited at J. S. 32-33.

Point III. It is unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amentment to try and to convict an attorney of misconduct and punish him by suspension on a standard of proof of "fair preponderance of the evidence."

The issue of the constitutional impermissibility of the use of the preponderance of the evidence standard of proof in this attorney disciplinary proceeding is a substantial federal question in the light that this Court has twice this Term granted plenary review in cases involving the issue of the constitutional impermissibility of the use of the preponderance of evidence standard of proof, to wit: certiorari granted April 28, 1980 to the United States Court of Appeals for the Fifth Circuit in Steadman v. S.E.C., docket number 79-1266 and probable jurisdiction noted on appeal from the Delaware Supreme Court in Doe v. Delaware, docket number 79-5932(J.S. 43), and in the light that in two cases in the immediate past, this Court has granted plenary

review and has decided this issue as a constitutional due process issue, to wit, Addington v. Texas, 441 U.S. 418 (1979) and Vance v. Terrazas, 444 U.S. 252, 100 S.Ct. 540 (1980), and in other cases in different contexts, to wit, In re Winship, 397 U.S.358 (1970), involving civil labelled juvenile proceedings; Mullaney v. Wilbur, 421 U.S. 684 (1975), involving a criminal case as to permissible standard of proof upon defendant to establish an affirmative defense; and the cases cited by this Court in Addington v. Texas, supra, 99 S. Ct. at 1812, namely, Woodby v. INS, 385 U.S. 276 (1967), involving deportation; and Schneiderman v.United States, 320 U.S. 118, 125 (1943), involving denaturalization, and Chaunt v. United States, 364 U.S. 350 (1960) involving denaturalization, Rosenbloom v. Metromedia, 403 U.S. 29 (1971) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), both involving libel, and The Barbed Wire Patent Case, 143 U.S. 275, 284 (1892), involving a patent (also, J.S. 41-53), and in the

light that the issue of standard of proof in this attorney disciplinary proceeding is in conflict with the statements and apparent holding of this Court on this issue in Ex Parte Wall, 107 U.S. 265, 288 (1882), for the Court, and by Mr. Justice Fields in dissent, 107 U.S. at 275, 318 (J.S. 50), in the light that this issue has produced a conflict among the states in that the majority of the state courts, namely 34 states out of a total of 44 states, require a standard of proof higher than preponderance of evidence, and generally "clear and convincing evidence" (J.S. 50-53), which are listed and described in the Appendix to appellant's Jurisdictional Statement at pp. 85a-97a, that at least two states, Georgia and Kentucky, require proof "beyond a reasonable doubt", and in the light that the decision of the New York courts in this case is also in direct conflict with on this issue with all of the federal courts reporting on this issue, namely, the United States Courts of

Appeal for the Fourth, Seventh, Eighth, and District of Columbia Circuits, and the United States District Court for the Southern District of New York (J.S. Appendix 85a-97a), holding that the standard of proof must be at least "clear and convincing", in the light that New York (and many other courts) holds that an attorney disciplinary proceeding is a "civil" proceeding, (See, Appellee's Motion, 15), which holding is in direct conflict with the ruling of this Court in Matter of Ruffalo, 390 U.S. 544, 550-551 (1968) that this proceeding is a penal, quasi-criminal adversary proceeding, indicating thereby the requirement for a higher degree of due process than in a civil case (See, J.S. 49-50), and in the light that almost all, if not all, of the fifty states and the District of Columbia, and the federal courts, have adopted either verbatim or in substance the American Bar Association Code of Professional Responsibility, (the penal code for lawyers), J.S.

Appendix 74a-84a, 7 Martindale-Hubbell Law Directory, 1M-2M (1980 ed.), New York Law Journal, September 10, 1980, pg. 1, cols. 3-4, pg. 6, cols. 1-3, and in the light that since the ABA Code of Professional Responsibility is, to all intents and purposes, uniform throughout the United States, it is only fair and proper that the standard of proof by which an attorney is tried and acquitted or convicted, should also be uniform, and in the light that the standard of proof is an essential component of fair trial, as much as the burden of proof is, see, People v. Patterson, 39 N.Y. 2d 288, 292-302, aff'd. sub nom Patterson v. New York, 432 U.S. 197 (1977), (J.S. 49), and directly affects the truth finding function of the trier of fact, In re Winship, 397 U.S. 358, 370 (1970)(Harlan,J.,concurring); Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 1808 (1979), and directly affects the feeling of appellant and all other lawyers that justice has not been done, Joint Anti-

Fascist Comm. v. McGrath, 341 U.S. 123, 170-173 (1951) (Frankfurter, J., concurring), particularly in the face of the fact that in the State of New York, on a charge of a mere traffic violation, not involving any risk of a jail term, the standard of proof is "beyond a reasonable doubt" in areas outside of the City of New York, and is "clear and convincing evidence", within cities having a population of over one million, Rosenthal v. Hartnett, 36 N.Y. 2d 269 (1975), which was decided as a federal constitutional matter under the Due Process Clause of the 14th Amendment, (J.S. 43-44), and in the light that issues of fraud and misrepresentation were decided in this case, issues as to which the settled law of the State of New York is that the standard of proof in civil case involving fraud that the standard of proof is not less than "clear and convincing" evidence, Simcuski v. Saeli, 44 N.Y. 2d 442, 452-453 (1978) as well as in every other jurisdiction (J.S. 46-47), so that

appellant was also denied Equal Protection under the Fourteenth Amendment by the use in this case of the lowest civil standard of proof of preponderance of evidence. This case is as deserving of plenary review as the similar issue was in Steadman v. SEC, docket number 79-1266, a case which affects a non-professional group, whereas the issue in this case affects every attorney across the nation, and will have an equal effect on other professions by extension. The issue presented is a weighty constitutional issue that deserves plenary review by this Court at this time. At the least, this Court might hold this case pending decision in Steadman v. SEC, docket no.79-1266.

Point IV. Conviction on a charge not made and not tried denied appellant due process under the 14th Amendment.

Appellee at Motion pp. 15-16 shows its admission that "misrepresentation" in Zolondek was not charged against appellant. Conviction on a charge not made denied ap-

pellant due process under the 14th Amendment and presents a substantial federal question. Matter of Ruffalo, 390 U.S. 544, 550-552 (1968); Cole v. Arkansas, 333 U.S. 196, 201-202 (1948); De Jonge v. Oregon, 299 U.S. 353, 363 (1961).

Conclusion

For the reasons stated in this opposition and in the Jurisdictional Statement, this appeal should not be decided summarily but should be set for plenary hearing.

Respectfully submitted,

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